78-1163

Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

OHIO EDISON COMPANY, *Petitioner,*

v.

NED E. WILLIAMS, DIRECTOR
OHIO ENVIRONMENTAL PROTECTION AGENCY,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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# Supreme Court of the United States

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No. 78-

OHIO EDISON COMPANY, *Petitioner,*

v.

NED E. WILLIAMS, DIRECTOR
OHIO ENVIRONMENTAL PROTECTION AGENCY,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, Ohio Edison Company,[1] respectfully prays that a writ of *certiorari* issue to review the decisions of the Supreme Court of Ohio overruling Petitioner's Motion to Certify and dismissing Petitioner's appeal from the judgment of the Franklin County Court of Appeals, which were entered in this proceeding on September 20, 1978.

[1] East Palestine Light and Power Company, a municipally owned electric utility, had been a separate party to the administrative proceeding below but was subsequently acquired by Ohio Edison Company. Petitioner operates nine coal-fired electric generating plants serving electric customers in thirty-five counties in northeast and central Ohio, and three coal-fired steam plants serving steam customers in Akron, Springfield, and Youngstown. These coal-fired plants are the subject of this petition.

## OPINIONS BELOW

The orders of the Supreme Court of Ohio dismissing Petitioner's appeal, overruling Petitioner's Motion to Certify and denying Petitioner's Motion for Rehearing appear as Appendices A, B and C, respectively. The decision of the Franklin County, Ohio Court of Appeals and that court's judgment rendered April 6, 1978 appear as Appendix D. That court's subsequent decision and its judgment denying reconsideration, issued on June 13, 1978, appear as Appendix E. Pertinent excerpts from decisions of the Ohio Environmental Board of Review and the Director of the Ohio Environmental Protection Agency and of the Findings of Fact, Conclusions of Law and Recommendations of the Hearing Panel of the Ohio Environmental Protection Agency appear as Appendices F, G, and H respectively. None of the above decisions or opinions have been officially reported.

## JURISDICTION

The order of the Supreme Court of Ohio denying Petitioner's Motion for Rehearing was issued on October 26, 1978. Appendix C. This petition for writ of *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

## QUESTION PRESENTED

Whether the Due Process Clause of the United States Constitution guarantees to Petitioner an opportunity to contest the substantive validity of the provisions of a state implementation plan prior to their civil and criminal enforcement?



## CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

This case arises under the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment to the United States Constitution is appended hereto as Appendix I. Pertinent provisions of the Clean Air Act, as amended, 42 U.S.C. §§ 7401 *et seq.*, involved in this case as well as certain relevant Ohio statutes and Ohio environmental regulations involved in this case are appended hereto as Appendices J through L.

## STATEMENT OF THE CASE

### A. Nature of the Case

This case presents a combined question of constitutional and environmental law which has yet to be resolved by this Court. In *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), this Court stated that considerations of excessive stringency and economic or technological infeasibility are not relevant when the Administrator of the United States Environmental Protection Agency ("U.S. EPA") initially determines whether a state implementation plan may be approved under § 110 of the Clean Air Act, 42 U.S.C. § 7410. If claims relating to the substantive validity of a state implementation plan are to be considered, this Court has stated that they should be resolved at the state level.[2]

Petitioner has attempted to vindicate its claims of excessive stringency and infeasibility by seeking a variance and by trying to secure judicial review of the

[2] *Union Electric Co.* v. *EPA*, 427 U.S. 246, 266 (1976).

implementation plan provisions in state administrative and judicial tribunals. However, a variance regulation adopted by the Ohio Environmental Protection Agency flatly prohibits the issuance of any variance after April 15, 1977. The validity of this regulation was upheld by the highest state court rendering a decision in this case. Appendix D. In addition, that court has denied Petitioner the opportunity to obtain review of the substantive validity of implementation plan provisions prior to enforcement. Appendices D and E. Although Petitioner believes that the state variance regulation is inconsistent and in direct conflict with Ohio statutory law, the appellate court decision on that issue is a matter of state law which may not properly be brought before this Court. However, the refusal to afford Petitioner an opportunity to test the validity of these regulations prior to enforcement constitutes a denial of the due process of law which is guaranteed by the Fourteenth Amendment to the U.S. Constitution.

### B. History of the Case

In January, 1972, the Ohio Air Pollution Control Board promulgated regulations which established ambient air quality standards and emission limitations for particulate matter and sulfur dioxide.[3] The Ohio ambient standards were more stringent than federal primary standards for either pollutant and the proportional rollback methodology employed to set the emission limitations resulted in regulations which were excessively stringent and, in some instances, so infeasible that compliance was impossible. Moreover, the sulfur dioxide emission limitations determined in this fashion were so unnecessary to protect public health and welfare that they have fallen into disrepute and been rejected by the U.S. EPA in the sulfur dioxide control plan which it prepared for Ohio. 40 C.F.R. § 52.1881. Although the same unnecessarily stringent regulatory methodology was employed to establish limitations for particulate matter, neither the U.S. EPA nor the Ohio EPA has yet acknowledged any need to revise these limitations. These regulations were submitted as part of the Ohio implementation plan to the Administrator of the U.S. EPA to obtain requisite federal approval in accordance with § 110(a) of the Clean Air Act, 42 U.S.C. § 7410(a). Federal approval was published in May, 1972.

[3] The ambient air quality standards for both air contaminants were set forth in AP-3-02 and the emission standards for particulate matter and sulfur dioxide were contained in AP-3-11 and AP-3-14, respectively. In January, 1977 the regulations of all state agencies were renumbered as part of the process of implementing an official, uniform citation system in the State of Ohio. Thus, AP-3-02 became OAC 3745-17-02; AP-3-11 became OAC 3745-17-10; and AP-3-14 became OAC 3745-17-13. Citations in this petition will be to the Ohio Administrative Code ("OAC"), with parallel references in the old format provided in the Table of Authorities.



Petitioner knew that it had a right to obtain review of the validity of these regulations sometime prior to enforcement. However, in 1972 it was not certain whether such review should be provided at the state or federal level. Therefore, Petitioner attempted to secure review in both forums.

#### 1. State Level

In early 1972, the Ohio Environmental Protection Agency ("Ohio EPA") and the Ohio Environmental Board of Review had not yet been created. These agencies were subsequently established by an act of the Ohio General Assembly which became effective on October

23, 1972. Revised Code Chapter 3745. After enactment of this legislation, appeals from rulemaking actions of the Ohio EPA would be taken to the Ohio Environmental Board of Review (Revised Code § 3745.04), and from there to the Franklin County, Ohio Court of Appeals (Revised Code § 3745.06), and eventually to the Supreme Court of Ohio (Revised Code § 3745.06).

Unfortunately, this review mechanism did not exist when the Air Pollution Control Board adopted its regulations. Ohio's Administrative Procedure Act, Revised Code Chapter 119, likewise provided no relief. In 1970, the Supreme Court of Ohio had determined that Ohio's Administrative Procedure Act could not be employed to obtain review of rulemaking or quasi-legislative proceedings. *Fortner* v. *Thomas,* 22 Ohio St. 2d 13, 257 N.E.2d 371, Syllabus 2 & 3 (1970). The message of *Fortner* was clear. Petitioner could not immediately challenge the action of the Air Pollution Control Board in adopting the regulations but had to wait until these regulations were actually applied. The air pollution regulations were to be applied in one of two ways in Ohio, *i.e.*, either in a permit proceeding or in a variance proceeding. Only a source presently in compliance with the emission limitations could obtain a permit. Revised Code § 3704.03(G).

Therefore, in mid-1972, Petitioner requested variances for all of its facilities. In May, 1973, the Ohio EPA Director proposed variance orders which denied the requested relief for all of its facilities. Petitioner filed adjudication requests which were consolidated with requests of other Ohio electric utilities. A consolidated hearing was conducted before a three member Hearing Panel of the Ohio EPA from March 4 through July 25, 1974. This adjudication hearing represented



the first adversarial proceeding, administrative or judicial, in which Ohio's air pollution control regulations were actually to be applied to Petitioner's facilities. Moreover, it was not merely the first but the only proceeding at the state level in which Petitioner would have an opportunity to contest the excessive stringency and infeasibility of the regulations.

In September, 1974, the three-examiner Hearing Panel of the Ohio EPA issued its findings of fact, conclusions of law and recommendations which constituted a near total affirmance of all of the challenges made by Petitioner. Appendix H. The Hearing Panel found that Ohio's ambient air quality standards and emission standards were not necessary to meet the requirements of state or federal law and urged the Director to embark on new rulemaking to develop implementation plan regulations which were not fatally defective. Appendix H, p. 72a-74a.

By order dated December 12, 1974, the Ohio EPA Director rejected the unanimous recommendations of his three triers of fact. The Director held that the Hearing Panel had erred by considering evidence challenging the validity of his regulations. Appendix G, p. 41a-42a. By holding that the regulations cannot be challenged, the Director rendered the proceedings below a nullity.

Petitioner appealed the Director's decision to the Ohio Environmental Board of Review ("EBR") in January, 1975.[4] The EBR held that the Director had correctly determined that the air pollution regulations could not be challenged in an adjudication hearing.

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[4] By statute, the EBR has exclusive jurisdiction over appeals from actions of the Director. Revised Code § 3745.04.

However, the EBR did order the Director to issue variances to Petitioner which would require compliance with both the sulfur dioxide and particulate matter emission standards at all of Petitioner's facilities within thirty-six months, or by mid-1980.

Both the Director and Petitioner appealed this decision to the Franklin County, Ohio Court of Appeals.[5] Among other matters, Petitioner assigned as error the refusal to permit a challenge to the substantive validity of the regulations. Petitioner argued that this refusal to allow a challenge of the validity of the regulations prior to enforcement constituted a denial of the due process of law guaranteed by the Ohio and U.S. Constitutions.[6] Ohio Edison Brief, pp. 38-42. The Director argued that the EBR erred in ordering the issuance of variances which would extend beyond the deadline date established in OAC 3745-35-03, *i.e.*, April 15, 1977. The Franklin County Court of Appeals accepted the Director's argument that regulation OAC 3745-35-03 was valid and, therefore, no variance can be issued in Ohio after April 15, 1977.[7] The Court dismissed all other assignments of error as being moot. Appendix D, p. 13a.

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[5] By statute, the Franklin County court of Appeals has exclusive jurisdiction over appeals from the EBR. Revised Code § 3745.06.

[6] This was the first time the due process issue could be raised because Ohio administrative agencies are not empowered to determine Constitutional questions. *S.S. Kresge Co.* v. *Bowers,* 170 Ohio St. 405, 166 N.E.2d 139 (1960).

[7] Petitioner agrees with the EBR that Revised Code § 3704.03(H) authorizes the issuance of variances past April 15, 1977. However, that is an issue of state law not properly before this court.



Although the Court of Appeals dismissed Petitioner's due process argument as being moot, a determination which Petitioner finds incomprehensible, the Court stated:

> "However, Ohio Edison is not without a remedy so far as the enforcement of unreasonable standards are concerned. If the standards are unreasonable as applied to Ohio Edison, the standards are subject to challenge in an adjudicatory proceeding when the director attempts to enforce the regulation, although not subject to modification or amendment by that method."
>
> (Appendix D, p. 14a.)

The appellate court simply refused to address any of the substantive defects in Ohio's air pollution control regulations. Moreover, the court held that review in an enforcement proceeding is a sufficient remedy. Petitioner sought reconsideration of the appellate court decision arguing that the Clean Air Amendments of 1977, and especially the noncompliance penalty provisions (42 U.S.C. § 7420), strengthened the case for preenforcement review. The court denied reconsideration. Appendix E.

On June 5, 1978, Petitioner filed a Notice of Appeal in the Supreme Court of Ohio. The Supreme Court dismissed Petitioner's appeal and overruled the motion to certify on September 20, 1978. Appendices A and B. On October 26, 1978 the Supreme Court of Ohio denied Petitioners' Motion for Rehearing. Appendix C.

During the pendency of the Supreme Court proceedings, the Director finally repealed, on August 8, 1978, his defective sulfur dioxide emission regulations which were based on the discredited proportional rollback methodology. Unfortunately, the particulate emission standards, which were also formulated using the same

methodology, remain on the books as effective regulations.[8]

### 2. Federal Level

In 1972, Petitioner believed that claims of excessive stringency and infeasibility must also be raised in review proceedings pursuant to § 307(b), 42 U.S.C. § 7607(b). *Getty Oil Co.* v. *Ruckelshaus,* 342 F.Supp. 1006 (D.C. Del. 1972), *aff'd,* 467 F.2d 349 (3rd Cir. 1972). Thus, Petitioner sought review of the Administrator's May, 1972 approval of the Ohio Implementation Plan in the U.S. Court of Appeals for the Sixth Circuit. On June 18, 1973, that court vacated the Administrator's approval for procedural reasons in *Buckeye Power, Inc.* v. *EPA,* 481 F.2d 162 (6th Cir. 1973) ("Buckeye I"). Although the appellate court did not reach the substantive issues, the court indicated that these issues could be raised in a § 307(b) review proceeding. *Buckeye I,* 481 F.2d 162, at 173.

After providing an opportunity for public comment, as required by *Buckeye I, supra,* the Administrator again approved the Ohio implementation plan in April, 1974, absent a sulfur dioxide control strategy. The sulfur dioxide portion of the state plan had been withdrawn by the Governor of Ohio in August, 1973. Again, Petitioner sought review in the U.S. Court of Appeals for the Sixth Circuit primarily because of the interdependence of sulfur dioxide and particulate emission control and the absence of known sulfur dioxide provisions. In *Buckeye Power, Inc.* v. *EPA,* 525 F.2d 60

[8] Since control of particulate and sulfur dioxide emissions are inextricably intertwined, this belated development of more reasonable sulfur dioxide emission standards has cost the company four years of compliance time which would otherwise have been available to install necessary pollution controls.



(6th Cir. 1975) ("Buckeye II"), the court held that the issues raised were not ripe for adjudication because they were being resolved at the state agency level. The Sixth Circuit specifically acknowledged the proceedings before the Ohio EPA Hearing Panel and concluded:

> "The federal Administrator's pronouncements on these points are definite and apparently conclusive, since he indicates that he will make them all conditions for continued approval of the Ohio plan. All of these changes referred to are designed to meet objections pressed by petitioners in this instant action. But the record before us shows that these changes are still in process of being made and that the Ohio plan is in process of major revision. The explanation for this is probably found in the fact that the *Ohio EPA has just completed extensive hearings upon the emission standards set in the original Ohio Plan.* On the basis of 7,000 pages of testimony, an Ohio Hearing Panel has published a 417 page report and recommended *downward revisions or elimination of the disputed Ohio emission standards applicable to particulates,* nitrogen oxide and sulfur dioxide." (525 F.2d 80, at 84; emphasis added.)[9]

Unfortunately, the Director ignored this report and its recommendations, and the revisions were never made.

After the Sixth Circuit's decision in *Buckeye II, supra,* this Court decided *Union Electric Co.* v. *EPA,* 427 U.S. 246 (1976), and eliminated any possibility that claims of excessive stringency and infeasibility could be raised in § 307(b), 42 U.S.C. § 7607(b) review proceedings. Therefore, Petitioner's third attempt to

[9] This language from *Buckeye II* refers to proceedings below in *this* case.

obtain review in the Sixth Circuit met with failure. *Northern Ohio Lung Association* v. *EPA,* 572 F.2d 1143 (6th Cir. 1978).

## REASON FOR GRANTING THE WRIT

### Fundamental Principles of Due Process of Law Require Pre-Enforcement Judicial Review of the Provisions of a State Implementation Under the Facts of This Case.

Procedural due process is a flexible concept which admits of no precise definition. What is required by due process will vary from case to case depending upon the facts involved and the interests to be protected. Although no universal rule can be mechanically applied to every case, certain basic principles have been clearly established by this Court. In *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), this Court provided the following description of procedural due process:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin* v. *Hale,* 1 Wall. 223, 233. See *Windsor* v. *McVeigh,* 93 U.S. 274; *Hovey* v. *Elliott,* 167 U.S. 409; *Grannis* v. *Ordean,* 234 U.S. 385. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo,* 380 U.S. 545, 552." (407 U.S. 67, at 80.)

The right to be heard at a meaningful time and in a meaningful manner is the central issue in this case. The Franklin County, Ohio Court of Appeals has determined that if a hearing upon the substantive validity of the air pollution regulations is provided at the enforcement stage, due process requirements are



satisfied. However, Petitioner believes that review in an enforcement proceeding simply cannot satisfy the fundamental requirement of a timely hearing.

Compliance with air pollution control regulations requires a great deal of time and money. Petitioner operates nine electric power plants and three steam heat plants in Ohio and compliance with the particulate emission regulations alone would require a construction program of several years and an expenditure of hundreds of millions of dollars. In view of the deadlines established in the Clean Air Act and the time necessary to install required control equipment, it is absolutely essential that review of the substantive validity of the regulations occur prior to enforcement. If pre-enforcement review is not permitted, Petitioner is forced to either expend enormous sums of money to comply with regulations which may later be declared invalid, or to risk potential exaction of civil and criminal penalties. This untenable choice cannot be harmonized with accepted notions of due process. *Ex parte Young,* 209 U.S. 123 (1908). The following language from the *Young* opinion is particularly relevant,

> ". . . Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute

> upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event. (209 U.S. 123, 148.)

The Clean Air Act Amendments of 1977 provide further justification for requiring pre-enforcement judicial review. The Amendments require the imposition of mandatory noncompliance penalties upon major sources if compliance is not attained within a certain time period. 42 U.S.C. § 7420. If Petitioner must wait until an enforcement action is brought before challenging the standards, it risks the imposition of severe noncompliance penalties, which cannot be tempered by prosecutorial discretion. Therefore, the addition of the noncompliance penalty section in the 1977 Amendments, strongly reinforces the fundamental due process necessity for pre-enforcement review under the U.S. Constitution.

Petitioner is cognizant of the fact that national ambient air quality standards must be attained and that if it chooses to challenge an implementation plan or to seek a variance that it litigates on its own time. *Train* v. *NRDC,* 421 U.S. 60 (1975). Nevertheless, there is a significant difference between litigating on your own time and being denied the right to litigate and the right to meaningful judicial review. The State of Ohio has denied Petitioner the fundamental right to a meaningful hearing on the merits of its claims. Such action by Ohio administrative officials and Ohio courts has made a mockery of federal constitutional due process.

The Director asserted below that the adjudication hearing was not Petitioner's only opportunity to contest the validity of these standards. The Director argued in the Supreme Court of Ohio that Petitioner



should have filed for declaratory judgment during the eight-month period between adoption of the regulations and creation of the EBR. This contention is devoid of merit and is totally inconsistent with Ohio EPA's prior legal position. During the course of the adjudication hearing, lead counsel for Ohio EPA made the following statements:

> "I think the Agency can, in its discretion, choose to allow an attack on the rules, which is essentially, I believe, what the utilities are doing." (Opening Statement delivered by lead counsel for Ohio EPA, March, 1974; Transcript of Hearing, Tr. p. 25)
>
> ". . . the Director has the legal authority to make rulemaking or legislative, as well as adjudicatory, decisions on the basis of evidence adduced at an adjudicatory hearing.
>
> * * *
>
> ". . . the Director has ample authority to consider a 'fine-tuned' application of his regulations to the power plants subject to this proceeding." (Ohio EPA Reply Brief, pp. 7, 25 and 26, filed in Consolidated Adjudication Hearing.)
>
> ". . . The question is one of decision making. This is what is the role of the adjudication. . . . It is an occasion, we believe, in which the Agency has an obligation to bite the bullet and say, 'No, you are wrong; you must comply literally, here in detail is what you will do and here is what you need not do,' and *it is possible, and we have stated, even to say to that applicant, 'You are correct. As you know, it would be unreasonable and unjust to apply the regulations. Therefore, you will be exempted,* . . .
>
> * * *
>
> "If they are correct, then *the Agency is under the obligation to bite the bullet and say, 'You are right,* it would not be just to apply these regulations to you. *You are exempted from those regu-*

*lations,' and that is the key to our position,* sir." (Closing Statement delivered by lead counsel for Ohio EPA, June, 1974, Transcript of Hearing, Tr. p. 6,589-90; emphasis added)

Prior to the Director's December 12, 1974 decision, the Ohio EPA consistently maintained the state implementation plan was subject to challenge in an adjudication hearing. The Director has waived any argument that Petitioner should have filed for declaratory judgment. The due process clause does not require Petitioner to forsee that a state agency will change its legal position in midstream in an attempt to shield its regulations from judicial scrutiny.

Furthermore, Ohio has precluded challenging the validity of environmental regulations by way of declaratory judgment. *State, ex rel. Williams* v. *Bozarth,* 55 Ohio St.2d 34, 377 N.E.2d 1006 (1978), *Warren Molded Plastics* v. *Williams,* 56 Ohio St.2d 352, —— N.E.2d —— (1978). In *Bozarth,* the Supreme Court of Ohio concluded that environmental regulations could not be challenged *via* declaratory judgment since the Environmental Board of Review has exclusive jurisdiction to review such regulations. Ohio's highest court reached this conclusion in spite of the fact that the regulations at issue in *Bozarth* had been adopted before the Environmental Board of Review was created.

In *Union Electric Co.* v. *EPA,* 427 U.S. 246 (1976), this Court declined to consider the utility's argument that due process of law required review of the substantive validity of implementation plan provisions in a § 307(b), 42 U.S.C. § 7607(b), proceeding. This Court said there had been no showing that some other opportunity to raise such claims before a court did not exist. 427 U.S. 246, at 269 fn. 19. Since this Court has determined that such claims may not be raised in a § 307(b) proceeding, Petitioner may be confined to either: 1) pre-enforcement review in a state forum, or 2) review in an enforcement proceeding. Clearly, pre-enforcement review is the most desirable and, in fact, the only realistic alternative.



An enforcement proceeding can be brought by federal, state, or local officials, or by private citizens. If the Director of the Ohio EPA commences the enforcement action and the regulations are challenged, then the Ohio EPA would be the appropriate party to defend the regulations. What happens, however, if the U.S. EPA, a local official, or a private citizen commences an enforcement action under § 113, 42 U.S.C. § 7413, or § 304, 42 U.S.C. § 7604, of the Clean Air Act? Would the federal agency or the citizen be expected to defend Ohio's implementation plan provisions in the event of a challenge? Moreover, with the virtual certainty that multiple enforcement actions will be brought in separate forums, inconsistent decisions could be reached with respect to the validity of the regulations. Clearly, it is not only procedural due process but also considerations of judicial economy and consistency which require pre-enforcement judicial review.

Moreover, Petitioner is confronted by an additional need for pre-enforcement review in this matter. Petitioner is an electric utility obligated by Ohio law to furnish adequate electric service to customers in thirty-five counties in northeast and central Ohio. Ohio Revised Code § 4905.22. Because of this legal obligation to serve, Petitioner is denied the option enjoyed by other industries to terminate its operations within a state effectively denying it access to its courts and a pre-enforcement determination of its rights under the

state implementation plan in order to avoid potential civil and criminal penalties.

## CONCLUSION

In *Ex parte Young, supra,* this Court was unwilling to accept the notion that governmental regulators are swathed in a cloak of infallibility exempting their actions from judicial scrutiny. If judicial review is to be meaningful, in both time and manner, the regulated party must not be forced to place his head on the chopping block as a condition precedent to obtaining such review. This case should be remanded to the Supreme Court of Ohio with instructions to provide Petitioner with its pre-enforcement right to determine the substantive validity of the Ohio state implementation plan regulations as applied to Petitioner's twelve facilities herein under the due process clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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# APPENDIX A

**Order of the Supreme Court of Ohio Dismissing Petitioner's Appeal.**

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus.

1978 TERM

To wit: September 20, 1978

OHIO EDISON CO., ET AL., *Appellants,*

*vs.*

NED E. WILLIAMS, Dir., *Appellee.*

No. 78-691

**Appeal From the Court of Appeals**

for Franklin County

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 8th day of January 1979.

/s/ THOMAS L. STARTZMAN
Thomas L. Startzman
*Clerk*

/s/ SAM F. ADKINS
Sam F. Adkins
*Deputy*

(SEAL)

## APPENDIX B

**Order of the Supreme Court of Ohio Overruling Petitioner's Motion to Certify.**

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, City of Columbus.

1978 TERM

To wit: September 20, 1978

OHIO EDISON CO., ET AL., *Appellants.*

*vs.*

NED E. WILLIAMS, Dir., *Appellee.*

No. 78-691

**Motion for an Order Directing the Court of Appeals for Franklin County to Certify Its Record**

It is ordered by the Court that this motion is overruled. COSTS:

Motion Fee, $20.00, paid by Fuller, Henry, Hodge & Snyder.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 8th day of January 1979.

/s/ THOMAS L. STARTZMAN
Thomas L. Startzman
*Clerk*

/s/ SAM F. ADKINS
Sam F. Adkins
*Deputy*

(SEAL)

## APPENDIX C

**Order of the Supreme Court of Ohio Denying Petitioner's Motion for Rehearing.**

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, City of Columbus.

1978 TERM

To wit: October 26, 1978

OHIO EDISON COMPANY ET AL., *Appellants,*

*vs.*

NED E. WILLIAMS, Dir., *Appellee.*

No. 78-691

**Rehearing**

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. —— Page ——.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 26th day of October, 1978.

/s/ THOMAS L. STARTZMAN
Thomas L. Startzman
*Clerk*

/s/ SAM F. ADKINS
Sam F. Adkins
*Deputy*

(SEAL)

# APPENDIX D

**Decision and Judgment of the Franklin County, Ohio Court of Appeals Issued April 6, 1978.**

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 77AP-461

OHIO EDISON COMPANY, *Appellant-Appellant*,

v.

NED E. WILLIAMS, Director of Environmental Protection,
*Appellee-Appellee.*

No. 77AP-462

EAST PALESTINE LIGHT AND POWER COMPANY,
*Appellant-Appellant*,

v.

NED E. WILLIAMS, Director of Environmental Protection,
*Appellee-Appellee*,

Nos. 77AP-472 and 77AP-473

OHIO EDISON COMPANY, ET AL., *Appellants-Appellees*,

v.

NED E. WILLIAMS, Director of Environmental Protection,
*Appellee-Appellant.*

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**Decision**

Rendered on April 6, 1978

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Cleveland, Ohio 44115.

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McCormac, J.

On August 15, 1972, Ohio Edison applied to the Environmental Protection Agency for variances which would authorize emissions of air pollutants in excess of applicable emission standard regulations for twelve Ohio Edison facilities. The proposed variances as issued contained compliance schedules requiring Ohio Edison to meet the standards prescribed by regulation by July 15, 1975. As to the remaining two facilities, the Gorge and Mad River Plants, the director issued proposed denials of the variance applications.



Ohio Edison timely requested adjudication hearings to contest the director's proposed action on the variance requests. The hearings (consolidated with one another and those regarding other electric utility companies) concluded on July 25, 1974. On December 12, 1974, the director issued his decision. The director declined to issue variances for sulfur dioxide emission standards, having been convinced that the sulfur dioxide emission regulation was more stringent than necessary. As to emissions of particulate matter, the director issued an enforcement order requiring compliance with particulate matter emission standards by April 15, 1977.

Ohio Edison appealed to the Environmental Board of Review, alleging that the director's order was unreasonable and unlawful in several respects. After hearings on July 2, 1975, and September 22, 1976, in which further evidence was adduced by the parties, the board, on May 20, 1977, rendered its decision. In principal part, the board held that the director erred in concluding that his sulfur dioxide emission regulations applicable to Ohio Edison were excessively stringent. The board ruled that the sulfur dioxide regulations of the director were lawful and reasonable and that the director was without authority to decline to apply them. The board ordered the director to issue variances to Ohio Edison with compliance schedules of 36 months during which time Ohio Edison was to comply with both particulate matter and sulfur dioxide emission standard regulations. The variances ordered by the board extended far beyond April 15, 1977.

Both Ohio Edison and the director have appealed from the board's order. The appeals have been consolidated for decisions.

Ohio Edison has set forth the following assignments of error:

"1. Whether the Ohio Environmental Board of Review erred in refusing to remand the Company's Appeal to the Director of the OEPA for further consideration and revision in accordance with the mutual wishes of both the Appellant and Appellee herein.

"2. Whether the Board erred as a matter of law in holding that administrative regulations must be enforced as written until formally amended or repealed unless clearly unreasonable on their face or in clear conflict with the enabling statutes.

"3. Whether the Board erred as a matter of law in holding that Ohio's Ambient and Emission Standards (AP-3-02, AP-3-11, and AP-3-14) could not be challenged, questioned, or modified upon application to a specific source or sources in adjudication proceedings unless unreasonable on their face or in clear conflict with the enabling statutes.

"4. Whether the Board erred as a matter of law in holding that these regulations were reasonable in general and in applying such regulations to all 12 Company plants herein.

"5. Whether the Board erred as a matter of law in holding that a variance granted under Section 3704.03 (H) of the Ohio Revised Code must impose a schedule for compliance with general emission standards.

"6. Whether the Board erred as a matter of law in determining that ambient necessity required the Company to comply with the Ohio sulfur dioxide emission (AP-3-14) limitation at all 12 of its plants herein.

"7. Whether the Board erred as a matter of law in creating a de facto ambient standard for sulfates ($SO_4$) to establish retroactive justification for the Ohio sulfur dioxide ($SO_2$) emission limitation.



"8. Whether the Board and Director erred as a matter of law in determining that ambient necessity required the Company to comply with the Ohio particulate emission (AP-3-11) limitation at all 12 of its plants herein.

"9. Whether the Board erred as a matter of law in substituting its judgment for that of the Director in generally employing an incorrect standard of review of factual matters.

"10. Whether the Board erred as a matter of law in determining adequate technology or alternate fuels existed that would enable Ohio Edison to comply with the sulfur dioxide emission standards (AP-3-14).

"11. Whether the Board erred as a matter of law in determining that the Company could install pollution control equipment on, or shut down, all 12 Company facilities in 36 months to comply with the Ohio particulate and sulfur dioxide emission (AP-3-11, AP-3-14) limitations.

"12. Whether the Board erred as a matter of law in employing material neither presented by the parties nor in evidence in the record on this appeal as the basis for its decision.

"13. Whether the Board erred as a matter of law in requiring more stringent emission standards then are necessary to protect public health and welfare in violation of the United States and Ohio Constitutions."

The director has set forth the following assignments of error:

1. "The Environmental Board of Review erred in ordering the director of Environmental Protection to issue variances which authorize the emission of particulate matter in excess of the applicable emission standard contained in the federally-approved state im-

plementation plan in the absence of evidence that such emissions will not prevent or interfere with timely attainment and maintenance of ambient air quality standards."

2. "The Environmental Board of Review erred in ordering the director to issue variances from his emission standard regulations which contain compliance schedules extending beyond the deadline date set forth in OAC 3745-35-53(F)(2)."

The primary issues in this case are the same as those before the court in our recent unreported case of *Cleveland Electric Illuminating Co. v. Ned E. Williams, Director*, case Nos. 76AP-929 and 76AP-938, rendered on December 8, 1977 (1977 Decisions, page 4487). The first issue is to what extent the director may issue or deny variances from his regulations. Ohio Edison had sought variances from ambient air regulations pertaining to particulate and $SO_2$ emissions. Variances were granted by the director to Ohio Edison from complying with the $SO_2$ emission standard regulations on the basis that the emission standards were too strict and unreasonable. Variances from compliance with particulate emission regulations were extended to April 15, 1977.

Upon appeal to the Board of Review, the board required enforcement of both particulate and $SO_2$ emission standard regulations with the requirement of a compliance schedule and ultimate compliance, no later than 36 months from the issuance of the variances.

As we held in the *Cleveland Electric Illuminating* case, R. C. 3704.03, in conjunction with the director's regulation EP-32-03, prohibits issuance of a variance from ambient air pollution regulations for more than one year or for any time after April 15, 1977. Complete discussion of the reasons for this holding is contained in the *Cleveland Electric Illuminating* case.



Hence, the order of the board granting variances for particulate and sulfur dioxide emission standards beyond April 15, 1977 is unlawful and contrary to law.

The director's second assignment of error is sustained.

All other assignments of error are overruled as being moot.

The appeal to the board was from variance orders which are no longer possible since the regulations prohibit variances after April 15, 1977. The reasonableness of the director's regulations was at issue only so far as the issuance of variance was concerned. As hereinafter stated, the regulations were not subject to modification, recission or amendment through an appeal from a variance order. Hence both the particulate and sulfur dioxide regulations remain in effect.

The fact that no further variance may be granted, either for particulate or $SO_2$ emissions, does not leave Ohio Edison or the director without other remedies that are fair and equitable to Ohio Edison or to the public. It does not mean that Ohio Edison plants, which are not in compliance with ambient air quality regulations, must be immediately shut down. The director is given discretionary enforcement options and need not request that an injunction be brought pursuant to R. C. 3704.06, even though there is a violation of his regulations. Nor is the Attorney General required to proceed with prosecution resulting in a penalty pursuant to R. C. 3704.99. The director, however, is given a great deal more effective enforcement by a holding that no further variance is possible which means that the operator is acting illegally if the emission from his plant exceeds the applicable air quality regulations. More prompt and effective measures can be taken for enforcement under penalty of severe monetary fines or threats of shut down to achieve at the earliest possible time obtainment of properly adopted air quality standards.

The fact that no further variance is possible and immediate attainment with particulate or sulfur dioxide emission standards does not preclude further challenge of these standards or regulations as applied to applicants during the enforcement process. Neither the director nor the board can use an appeal from a variance order to adopt new rules and regulations or to modify the rules and regulations adopted by the director. The regulations are not so subject to attack in a variance proceeding either before the director or on appeal therefrom to the board. Regulations may be adopted, modified or amended only in a quasi-legislative or rulemaking proceeding.

However, Ohio Edison is not without a remedy so far as the enforcement of unreasonable standards are concerned. If the standards are unreasonable as applied to Ohio Edison, the standards are subject to challenge in an adjudicatory proceeding when the director attempts to enforce the regulation, although not subject to modification or amendment by that method.

If the sulfur dioxide emission standard regulations are unreasonable and too strict, the director should promptly promulgate reasonable and enforceable regulations through the rulemaking process, rather than leaving the state with regulations which are, as a practical matter, unenforceable. The director acted within the authority of R. C. 3704.03 and his regulations in attaching conditions to an application for a variance and in requiring a compliance schedule as a condition to the granting of a variance. R. C. 3704.03(H) specifically refers to conditions of a variance, although the board's action in extending variances beyond April 15, 1977 was unlawful.

Turning to the assignments of error of the parties, the director's first assignment of error is overruled as moot since no further variance beyond April 15, 1977 is lawful. The director's second assignment of error is sustained, as the Board of Review acted unlawfully in issuing variances



from the director's emission standard regulations, which contain compliance schedules beyond April 15, 1977.

Ohio Edison's assignments of error are all overruled, in that no variance either from particulate or sulfur dioxide emission standard regulations may be granted beyond April 15, 1977.

The director's first assignment of error is overruled and the director's second assignment of error is sustained. The assignments of error of Ohio Edison are overruled. The decision of the Board of Review is reversed and vacated. The case is remanded to the director for further procedure consistent with this decision.

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HOLMES, P.J., and STRAUSBAUGH, J., concur.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 77AP-461

OHIO EDISON COMPANY, *Appellant-Appellant,*

v.

NED E. WILLIAMS, Director, etc., *Appellee-Appellee.*

No. 77AP-462

EAST PALESTINE LIGHT AND POWER COMPANY,
*Appellant-Appellant,*

v.

NED E. WILLIAMS, Director, etc., *Appellee-Appellee.*

No. 77AP-472 and No. 77AP-473

OHIO EDISON COMPANY ET AL., *Appellants-Appellees,*

v.

NED E. WILLIAMS, Director, etc., *Appellee-Appellant.*

**Journal Entry of Judgment**

For the reasons stated in the decision of this court rendered herein on April 6, 1978, appellant Director's assignment of error 2 is sustained, and his assignment of error 1 is overruled, and Ohio Edison's assignments of error are overruled, and it is the judgment and order of this court that the order of the Environmental Board of Review is reversed and vacated, and this cause is remanded to that Board for implementation of this court's judgment and



for remand to the Director for further procedure consistent with said decision.

HOLMES, P.J., STRAUSBAUGH and MCCORMAC, JJ.
By /s/ JOHN W. MCCORMAC
John W. McCormac

*Judge*

cc: Fred J. Lange, Jr.
James C. Carroll
David E. Northrop
Michael N. Tousey
Michael L. Hardy
Van Carson

# APPENDIX E

**Decision and Judgment of Franklin County, Ohio Court of Appeals Denying Reconsideration Issued June 13, 1978.**

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 77AP-461

OHIO EDISON COMPANY, *Appellant-Appellant,*

v.

NED E. WILLIAMS, DIRECTOR OF ENVIRONMENTAL PROTECTION, *Appellee-Appellee.*

No. 77AP-462

EAST PALESTINE LIGHT AND POWER COMPANY, *Appellant-Appellant,*

v.

NED E. WILLIAMS, DIRECTOR OF ENVIRONMENTAL PROTECTION, *Appellee-Appellee.*

Nos. 77AP-472 and 77AP-473

OHIO EDISON COMPANY, ET AL., *Appellants-Appellees,*

v.

NED E. WILLIAMS, DIRECTOR OF ENVIRONMENTAL PROTECTION, *Appellee-Appellant.*

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**Decision**

Rendered on June 13, 1978

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FULLER, HENRY, HODGES & SNYDER,
MR. WILSON W. SNYDER,
MR. C. RANDOLPH LIGHT and
MR. FRED J. LANGE, JR., of Counsel,
300 Madison Avenue,
P. O. Box 2088,
Toledo, Ohio 43603,
and

Mr. James C. Carroll,
47 North Main Street,
Akron, Ohio 44308,
For Ohio Edison Company.

Mr. William J. Brown, Attorney General,
Mr. David E. Northrop, Assistant,
Environment Law Section,
State Office Tower,
30 East Broad Street,
Columbus, Ohio
For Ned E. Williams, Director
of Environmental Protection.

Segreti & Tousey,
Mr. A. Mark Segreti, Jr., and
Mr. Michael N. Tousey,
169 East Livingston Avenue,
Columbus, Ohio.

Ginsberg, Guren & Merritt,
Mr. Michael L. Hardy and
Mr. James M. Friedman, of Counsel,
650 Terminal Tower,
Cleveland, Ohio 44113.

Squire, Sanders & Dempsey,
Mr. Van Carson, of Counsel,
1800 Union Commerce Building,
Cleveland, Ohio 44115.

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McCormac, J.

Appellant, Ohio Edison Company, has moved the court for reconsideration of its decision rendered April 6, 1978, requesting that the cases be remanded to the Director of the Environmental Protection for purposes of tailoring emission standards to meet public health and welfare needs while eliminating unnecessary over-regulation for appellant's twelve involved facilities. Appellant claims that the



overruling of thirteen of their assignments of error as moot leaving unresolved the substantive issues inherent therein violates due process rights of appellant in exposing appellant to potential assessment of noncompliance penalties.

Appellee vigorously opposes the motion for reconsideration, arguing that this court correctly decided that a wholesale challenge to emission standard regulations cannot be asserted in an appeal from an adjudication hearing on an application for a variance.

Appellant's motion for reconsideration is overruled. Appellant has had, and continues to have, adequate remedies to thwart imposition of unlawful regulations. This case is quite different from that relied upon by Ohio Edison, to wit: *Abbot Laboratories v. Gardner* (1956), 307 U.S. 136, where the court found that plaintiffs had a right to bring a declaratory judgment action to seek a pre-enforcement review of regulations, there being no statutory preclusion to that remedy. In this case no appeal was taken from the promulgation of the regulations involved. Instead the attempt to obtain a comprehensive review of the regulations took place in regard to an appeal from an administrative proceeding where a variance was sought. Since a variance is no longer possible, the issue of the appropriateness of a variance is moot.

However, there is nothing within our decision that prohibits the Director of the Environmental Protection Agency from modifying or amending its particulate and sulfur dioxide emission standards to achieve the results advocated by appellant, which in essence are those required to be considered by R. C. 3704.03(D). In fact this court has urged that sulfur dioxide emission standards be amended or repromulgated based upon the apparent agreement of the parties that the present standards are unworkable.

Appellant's motion for reconsideration is overruled.
Holmes, P.J., and Strausbaugh, J., concur.

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IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 77AP-461

OHIO EDISON COMPANY, *Appellant-Appellant,*

v.

NED E. WILLIAMS, DIRECTOR, ETC., *Appellee-Appellee,*

No. 77AP-462

EAST PALESTINE LIGHT AND POWER CO., *Appellant-Appellant,*

v.

NED E. WILLIAMS, DIRECTOR, ETC., *Appellee-Appellee.*

No. 77AP-472 and No. 77AP-473

OHIO EDISON COMPANY, ET AL., *Appellants-Appellees,*

v.

NED E. WILLIAMS, DIRECTOR, ETC., *Appellee-Appellant.*

**Journal Entry**

For the reasons stated in the decision of this court rendered herein on June 13, 1978, it is the order of this court that the motion for reconsideration is overruled.

HOLMES, P.J., STRAUSBAUGH and MCCORMAC, JJ.

By /s/ JOHN W. MCCORMAC
Judge John W. McCormac

cc: Fred J. Lange, Jr.
James C. Carroll
David E. Northrop
Michael N. Tousey
James M. Friedman
Van Carson

## APPENDIX F

**Pertinent Excerpts From the Decision (Findings of Fact and Final Order) of the Ohio Environmental Board of Review**

**Issued May 20, 1977.**

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW
STATE OF OHIO

Case No. EBR 75-5

OHIO EDISON COMPANY
47 North Main Street, Akron, Ohio 44308,
*Appellant,*

v.

NED E. WILLIAMS, DIRECTOR OF ENVIRONMENTAL PROTECTION
P. O. Box 1049, Columbus, Ohio 43216,
*Appellee.*

Case No. EBR 75-6

EAST PALESTINE LIGHT AND POWER COMPANY
West Main Street Extension, East Palestine, Ohio 44413,
*Appellant,*

v.

NED E. WILLIAMS, DIRECTOR OF ENVIRONMENTAL PROTECTION
P. O. Box 1049, Columbus, Ohio 43216,
*Appellee.*

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**Findings of Fact and Final Order**

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Issued by:

THE ENVIRONMENTAL BOARD OF REVIEW
Stanley Weissman, Chairman
Sherman L. Frost, Member

395 East Broad Street, Suite 305
Columbus, Ohio 43215
Tel: 1/614/466-8950

Issued on: May 20, 1977

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Environmental Law Section
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17th Floor
30 East Broad Street
Columbus, Ohio 43215

* * *

V

Based upon the above findings the Board makes the following order:

(1) Within seventy-five (75) days of issuance of this order by the Board the Director is to issue variances to the Ohio Edison Company for those sources which are the subject of this appeal;

(2) These variances are to be such that they contain a compliance schedule whereby each source is brought into compliance with the emission rates given in Chapter AP-3 of the Regulations of the Ohio Environmental Protection Agency for both particular matter and sulfur dioxide, by a method or methods chosen by the Ohio Edison Company and acceptable to the Director; the sources should be brought into compliance as expeditiously as pos-



sible with the maximum possible compliance time of no later than 36 months from the issuance of said variances allowable for those sources where FGD is chosen.

(3) The seventy-five (75) days given above in Section (1) of this order are to provide time for:

(a) to determine which abatement method will be used for each source; and

(b) comply, where necessary, with the lawful procedural requirements to grant a variance to Regulation EP-32-03(F)(2); and

(c) to comply with any applicable federal laws and regulations, including but not limited to, where necessary, lawfully amending the Ohio Implementation Plan when the compliance schedules in the said variances contain dates which exceed the deadlines given in the federally approved Ohio Implementation Plan.

The Board in accordance with Section 3745.06 of the Revised Code informs the parties that:

Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the

date upon which Appellant received notice from the Board by certified mail of the making of the order appealed from. No appeal bond shall be required to make an appeal effective.

THE ENVIRONMENTAL BOARD OF REVIEW

/s/ STANLEY WEISSMAN
Stanley Weissman, Chairman

/s/ SHERMAN L. FROST
Sherman L. Frost, Member

Entered in the Journal of the Environmental Board of Review this 20th day of May, 1977 at Columbus, Ohio.

[Certificate of Service Omitted in Printing]

## APPENDIX G

**Pertinent Excerpts From the Decision (Final Findings and Order) of the Director of the Ohio Environmental Protection Agency Dated December 12, 1974.**

## PART I

## HISTORY OF THE CASE

A. *Background*

This consolidated adjudication hearing was held pursuant to the provisions of Chapter 119 of the Ohio Revised Code and other pertinent legislation. It involved eight (8) investor owned electric utilities, one (1) consumer owned electric utility, and four (4) municipal electric utilities. These cases were consolidated because of common issues of fact and law critical to a decision as to the granting of variances or operating permits by the Ohio Environmental Protection Agency to each of these companies. The individual cases which comprised this consolidated proceeding are as follows:

*Cardinal Operating Company*

Unit No. 1—Case No. 73-A-V-132

Unit No. 2—Case No. 73-A-V-133

*Cincinnati Gas and Electric Company*

Miami Fort Power Station—Case No. 73-A-V-144

West End Power Station—Case No. 73-A-V-149

W. C. Beckjord Station—Case No. 73-A-P-156

*Cleveland Electric Illuminating Company*

Lake Shore Plant—Case No. 73-A-P-120

Ashtabula Plant—Case No. 73-A-V-146

Avon Lake Plant—Case No. 73-A-V-147

Eastlake Plant—Case No. 73-A-V-148

*Columbus and Southern Ohio Electric Company*

Pickaway Generating Station—Case No. 73-A-V-137

Conesville Generating Station—Case No. 73-A-V-138

Poston Generating Station—Case No. 73-A-V-139

*Dayton Power and Light Company*

Frank M. Tait Station—Case No. 73-A-V-152

*Ohio Edison Company*

Gorge Plant—Case No. 73-A-P-126

R. E. Burger Plant—Case No. 73-A-V-128

Toronto Plant—Case No. 73-A-V-129

W. H. Sammis Plant—Case No. 73-A-V-130

Niles Station—Case No. 73-A-V-134

Edgewater Station—Case No. 73-A-V-135

Norwalk Station—Case No. 73-A-V-136

North Avenue Steam Station—Case Nc. 73-A-V-140

Rockaway Steam Plant—Case No. 73-A-V-141

Mad River Station—Case No. 73-A-V-142

Beech Street Steam Plant—Case No. 73-A-V-143



*Ohio Power Company*

Tidd Plant—Case No. 73-A-V-131

Woodcock Plant—Case No. 73-A-V-153

Philo Plant—Case No. 73-A-V-155

Muskingum River Plant—Case No. 73-A-V-154

*Ohio Valley Electric Corporation*

Kyger Creek Plant—Case No. 73-A-V-150

*Toledo Edison Company*

Bay Shore Plant—Case No. 73-A-V-122

Acme Station—Case No. 73-A-V-151

*City of Cleveland Division of Light and Power*—Case No. 73-A-P-123, Case No. 73-A-V-127

*Dover Municipal Power Plant*—Case No. 73-A-P-145

*East Palestine Light and Power Company*—Case No. 73-A-V-159

*Painesville Municipal Electric Company*—Case No. 73-A-V-157

Additionally it should be noted that Buckeye Power has a partial ownership interest in the Cardinal Generating facility.

Applications for variances or operating permits were submitted by all of the applicants to the Ohio Air Pollution Control Board, the predecessor of the Ohio Environmental Protection Agency. In May, 1973, the Director issued proposed variances or operating permits to the applicants. Challenges to these actions in the form of requests for adjudication hearings pursuant to Chapter 119 and the Agency's enabling legislation were subsequently filed.

Prior to commencement of the consolidated hearings in this matter, a Motion for Leave to Intervene was filed

by the Public Utilities Commission of Ohio on February 22, 1974. On February 28, 1974 the panel of three Hearing Examiners, chaired by the Chief Hearing Examiner, who had been assigned to hear these consolidated cases rendered their decision denying the Motion for Leave to Intervene. The gist of this Decision was that Procedural Rule EP-40-21(F) provided that persons other than parties or witnesses presented by parties might present oral or written arguments for the record and file proposed findings and orders, conclusions of law or briefs for consideration by the Hearing Examiners. The Motion filed by the Public Utilities Commission of Ohio and the accompanying statement indicated that the Commission was not seeking Leave to Intervene either to present material evidence or to cross-examine witnesses, but rather to observe the proceedings and examine the evidence so that it might determine which position to take. The Examiners concluded that procedures existed under the previously cited Procedural Rule enabling the Public Utilities Commission of Ohio to participate in this manner and the intervention was an inappropriate remedy. An interlocutory appeal of this Decision to the Director of the Ohio Environmental Protection Agency was refused in a letter from the Director to counsel for the Public Utilities Commission of Ohio.

There were four (4) citizens who filed objections pursuant to the provisions of Revised Code Section 3745.07. One of the original four objectors, Mrs. Joseph Fetchik, submitted to the Chief Hearing Examiner, on February 12, 1974, a letter withdrawing her objection for the stated reason that due to a recent illness she was unable to attend any hearings in this matter. Additionally, a second objector, Mrs. Elizabeth Gemberling, Executive Director of the American Lung Association of Summit County, submitted a written statement which was treated by the Hearing Panel as the expression of an opinion pursuant to



Procedural Regulation EP-40-21(F) rather than documentary evidence. This conclusion was reached because Mrs. Gemberling was not in attendance at the hearing and there would have been no opportunity to cross-examine her as to any factual assertions made in this written submission. The other two objectors did actively participate. Mrs. Patricia Smith representing the Air Conservation Committee of the Northern Ohio Lung Association participated in regard to presentations involving Cleveland Electric Illuminating Company and the City of Cleveland. Mr. Charles Miller, an attorney representing himself as an objector, participated in the presentation involving the City of Cleveland.

Hearings in these consolidated proceedings commenced on March 4, 1974. The evidentiary portion of the hearing was concluded on May 23, 1974. Oral argument by counsel involved in these proceedings was held on July 25, 1974. The transcript comprises some 6,830 pages. Additionally, an extensive number of exhibits, many of them lengthy technical reports, were introduced. Extensive briefs and reply briefs exhaustively treated the legal and factual issues involved in these cases.

B. *Issues Raised at the Hearing*

The contentions of the utility applicants as a group and the Ohio Environmental Protection Agency revolve around certain general areas of concern. The utility applicants contended that Ohio's ambient air quality standards and emission regulations are improperly drafted and did not take into account considerations such as health effects associated with various ambient levels of pollutants, dispersion of pollutants, wind speed, topography and other considerations which they argued are mandated by federal law and regulations as well as relevant portions of the

Ohio EPA enabling legislation. The Agency contended that the present Ohio ambient air quality standards are necessary to protect the health of Ohio's citizens and it also contended that the presently formulated emission standards are necessary in order to achieve the required ambient levels. The joint utility applicants also contended that measured ambient sulfur dioxide levels indicate no need for emission control in many parts of the state. Ohio EPA contended that installation of flue gas desulfurization equipment (FGD) or reduction in sulfur content of fuel is necessary for twenty plants.

The joint utility applicants further contended that emission control devices for the removal of sulfur oxide, generically designated as flue gas desulfurization systems, have not been adequately demonstrated to a sufficient degree to require the investment of considerable sums of money estimated to be in excess of $2 billion to control sulfur oxide emissions by Ohio's electric utilities. Ohio EPA contended that such emission control systems have been adequately demonstrated and that they are the only ways to assure achievement of requisite ambient levels. The joint utility applicants argued that insufficient quantities of limestone are available to permit widespread operation of FGD systems which require it in Ohio. Ohio EPA asserted that adequate supplies are available or can be developed.

The joint utility applicants were also critical of a requirement that they install flue gas desulfurization equipment because the lime-limestone systems produce a sludge which must be thickened or hardened and then disposed of in some land area specifically set aside for this purpose. The utility applicants argued that the additional costs required by sludge disposal make the utilization of flue gas desulfurization unreasonable in light of the



benefits to be derived particularly since they also contended that an alternative system for achieving ambient air quality exists. Ohio EPA argued that methods for sludge disposal exist and have been demonstrated. It contended that the utility applicants are able to find methods to reasonably dispose of this sludge and that the trading of a solid waste disposal problem for an air pollution problem is environmentally acceptable.

The joint utility applicants contended that utilization of tall stacks, perhaps in combination with so-called intermittent control systems which respond to periodically high degrees of emissions and unfavorable meteorological conditions, will achieve the required ambient levels and are a reasonable means of achieving compliance with State and Federal air pollution control statutes and regulations. Ohio EPA contended that the utilization of tall stacks permits sulfur dioxide to remain in the ambient air for substantially longer periods and enhances its conversion to so-called secondary pollutants such as acid sulfate aerosols which Ohio EPA contended are as harmful if not more harmful than sulfur dioxide itself. Ohio EPA also contended that the utilization of tall stacks is not legally permissible in this situation because flue gas desulfurization is an adequately demonstrated emission control technique and the Clean Air Act Amendments of 1970 required an attempt to utilize emission controls in order to achieve ambient levels before other methods are approved. The joint utility applicants disagreed and contended that the primary purpose of federal and state legislation is to achieve ambient levels of air quality. They contended that any method which permits an applicant to do so is permissible.

All parties agreed that low sulfur coal and fuel oil are in short supply. Utilization of fuel switching is not

a viable control strategy for most electric utilities at this time. Ohio EPA contended, however, that washing or blending of coal can significantly reduce the sulfur content of fuels now in use to 3%. Utility applicants expressed doubts.

Finally, all parties agreed that there is not present need in Ohio for nitrogen oxide emissions standards or ambient standards and they both recommended the revocation of existing regulations.

C. *Hearing Panel's Report*

On September 6, 1974 the Hearing Panel filed an extensive 417 page report and recommendations which explained in great detail the evidence presented at the hearing and the reasoning behind their recommendations to the Director.

The recommendations of the Hearing Panel were the following:

1. The Hearing Panel recommends that the Director adopt the present Federal primary annual average and twenty-four hour maximum ambient air quality standards for sulfur dioxide and particulate matter and repeal Ohio's existing ambient standards for those pollutants.
2. The Hearing Panel recommends that the Director adopt a county by county classification and realistic emission limitations upon emissions of sulfur dioxide and particulate matter based upon accurate ambient data for each county and the most sophisticated diffusion modeling techniques presently available. Existing priority classifications and emission regulations for these pollutants should be repealed.



3. The Hearing Panel recommends that Regulation AP-7-06 be repealed.
4. The Hearing Panel recommends that the Director repeal Regulation EP-10-06 [AP-2-06] and adopt a new regulation clearly expressing the means for attaining the objectives which the present regulation seeks to attain.
5. Recommendations 1-4 should be implemented through utilization of ORC Chapter 119 rule-making procedures.
6. The Hearing Panel recommends that no compliance orders be issued as a result of this proceeding until Recommendations 1-4 have been implemented.
7. In the event that the Director should determine that installation of FGD systems appears necessary at any plant involved herein, the Hearing Panel recommends that the Director obtain information regarding the Bruce Mansfield and NIPSCO scrubber systems in 1976 before issuing the draft order attached hereto. (See the Hearing Examiners' report for the orders.)
8. In the event that the Director determines that particulate control measures must be implemented now, the Hearing Panel recommends issuance of the draft order attached hereto. (See the Hearing Examiners' report for the orders.)

## PART II

## ADEQUATE DEMONSTRATION OF TECHNOLOGY

The major focus of attention in the hearing was on the availability of flue gas desulfurization equipment for use on electric utility facilities. The Hearing Examiners' Report concluded that "Flue gas desulfurization has not been demonstrated to be a method of sulfur dioxide control presently available for implementation by the Ohio Electric Utilities." This conclusion is combined with conclusions as to the appropriateness of the Agency's regulations for sulfur oxides, nitrogen oxide and particulate matter to form the recommendation that no compliance orders be issued until regulations have been revised and until information has been obtained regarding the demonstration of new scrubber systems. The Director rejects the Report's conclusion (No. 15) as to the technological feasibility of flue gas desulfurization.

### A. *Definition of Sufficient Demonstration*

The Hearing Examiners' Report proceeds from an overly restrictive definition of what constitutes a sufficient or adequate demonstration of technology to an unacceptable conclusion. The definition accepted by the report is that presented by the American Academy of Engineering Ad Hock Panel: the more or less continuous operation for one year of a 100 megawatt or greater unit. The Hearing Examiners may also have been relying upon the additional condition specified by one witness for the joint applicants: that such a unit, after operating continuously for one year, should show no significant corrosion or erosion problems. This definition of a sufficient demonstration of control technology was the only one presented or considered in the Hearing Examiners' Report. In the



Director's opinion, such a definition is far too restrictive to be appropriate for an enforcement program in a relatively new field such as environmental control. To a large extent, the use of this sort of definition would obligate an enforcement agency to rely upon the willingness of the regulated entities to install and test such systems for at least one year at their own discretion before proceeding to further enforcement action. The electric utilities in Ohio cannot reasonably be expected to take such action of their own free will, if the end result of this action will be still greater and more expensive requirements placed upon them.

A more adequate set of criteria for the sufficient demonstration of technology was propounded by the Court of Appeals for the District of Columbia Circuit in *Essex Chemical v. Ruckelshaus,* 5 ERC 1820. (1973). The court said in this opinion that

> "An adequately demonstrated system is one which has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interest of pollution control without becoming exorbitantly costly in an economic or environmental way."

Moreover, the Circuit Court decision states that pollution control equipment does not need to be routinely achieving the air quality standard within the affected industry prior to promulgation of rules. This definition does not require the pollution abatement equipment to be free of uncertainty before its adoption as a control method. Instead, the technology must show the promise of increasing reliability and increasingly efficient control of pollutants. In the contest of the Clean Air Act of 1970, which mandates achievement of air quality standards

within a very short period of time, enforcement agencies must be allowed to rely upon some control methods that have not been proven to be absolutely certain and absolutely free of defects in order to achieve this goal.

B. *Sufficient Demonstration*

The evidence presented in the Hearing Examiners' Report and in the record of the hearing indicates that over the past few years flue gas desulfurization equipment has shown marked increases in reliability and in efficiency of control in demonstrations both in the United States and overseas. The Director feels that the improvements which have been experienced provide sufficient evidence that flue gas desulfurization technology can meet the criteria provided in the District of Columbia Circuit Court opinion.

Scrubber systems installed in the United States and overseas have admittedly experienced many operational problems. But even the systems which are widely acknowledged to have been unsuccessful showed improvements in reliability over time. The record of the Meramac and the Kansas Power and Light—Lawrence Station scrubbers shows the elimination of some of the plugging and corrosion problems which were experienced in the early months of operation of those systems. The Lawrence Station scrubbers are said to have achieved "fairly good" reliability by early 1971 (Report - page 119). Modification of similar systems at the Hawthorne station of Kansas City Power and Light to "tail end" systems achieved still further improvements in performance. The "tail end" scrubbing system installed at the Will County Station of Commonwealth Edison in early 1972 experienced the elimination of scaling problems and an availability rate which at times approached 80%. In this instance and in some



of those which follow it in the Report, a careful reading will show that the scrubbers were available for use at least as much as the boilers were. This was often true, for instance, in the operation of the magnesium oxide system installed at the Mystic Station of Boston Edison. This system experienced very erratic performance, but its overall reliability was rated as "good" by a utility witness. The erratic performance of the scrubber system was attributed in many cases to the performance of the boiler system rather than to defects in the scrubber system itself.

Perhaps the highest level of reliability yet achieved in a scrubber system is that experienced by the Paddy's Run station of Louisville Gas and Electric. This system, which has been in operation since April of 1973, has experienced "no particularly significant problem areas" (page 132) in its operation. The downtime experienced by this system has been due to boiler tube failures or to non-operation of the boiler to which this system is attached. It may be questioned whether the utility boiler system, which has been installed and in use for many years, would actually meet the tests of the criteria supplied by the American Academy of Engineers.

The efficiency of removal of flue gas desulfurization systems has shown similar increases over time. The Meramec and Kansas Power and Light systems, for instance, achieved a removal efficiency of between 60 and 70%. Later systems have achieved much higher removal efficiencies, notably the Wood River installation's catalytic oxidizer system, with an 85% removal rate, and the various carbide sludge scrubber systems, which appear to achieve removal rates of between 80 and 93%.

With numerous examples of utility-sized scrubber systems operating in the United States and elsewhere, and

considering that problems of removal efficiency and reliability are being worked on and solved as experience with the systems increases, there is no doubt that scrubber systems such as those presently in use will be used to abate sulfur oxide emissions from these types of sources. Those doubts which do remain are much less significant: how to deal with specific problems in specific installations, location of supplies of chemical materials, and the like. Existence of problems of this magnitude does not prove that flue gas desulfurization systems are not adequately demonstrated within the terms of the *Essex* definition. Only a very real question as to whether scrubber systems could be at all appropriate for use in sulfur oxide abatement at any place could justify waiting for a full demonstration before ordering such equipment. In fact, there seems no reason to suppose that most of the smaller problems remaining could not be worked out before such systems were in use on the boilers belonging to the Ohio utilities, even if such systems were ordered immediately. In the Director's opinion, therefore, there would be still less reason for waiting for further demonstrations before proceeding with enforcement action. The availability of scrubber systems for use on some Ohio utility boilers is therefore not in itself an obstacle to proceeding with enforcement action. Recommendation 7 of the Hearing Panel is therefore rejected.

## PART III

## APPLICATION OF THE STATE REGULATIONS

### A. *Legal Constraints on Decision Making by the Director*

The Director is bound by law and his own regulations to base his final decision in any adjudication hearing solely on the evidence presented in the record. When deciding the outcome of an adjudication hearing, the Director can



not act in a legislative (rule-making) capacity. He must act as judge. Thus, he must be both fair and impartial to all parties. As a judge he must carefully weigh the total body of the evidence. If one party in the case presents a more persuasive argument than another party, and if the one party meets its allocated burden of proof, then that party should prevail. The Director must also give weight to the Hearing Examiners' opinion concerning the outcome of the case, for it is they who have heard all of the evidence and are responsible for the actual conduct of the hearing. Thus the Director must base his final decision on the weight of the evidence. In this regard it should be noted that the Director's final order concluding this consolidated case or any other adjudication case should not be viewed as an absolute indicator of the Director's future policy or rule making position concerning the subject matter of the adjudication.

### B. *Allowable Scope of Attack by a Party on Regulations During an Adjudication Hearing*

In determining the scope of questions which could be raised at the consolidated hearing the Hearing Examiners misinterpreted (1) the principles set down in *Battles v. The Ohio Racing Commission,* 52 Ohio App. 2d 530, 230 N.E. 2d 622 (1967) and (2) the intent of the Director regarding the scope of the hearing.

The Hearing Examiners on Pages 21 and 22 of their report seemed to imply that the electric utility companies had the right to challenge Ohio's ambient air quality standards in an adjudication hearing. They indicated that since the utilities had appealed Chapter EP-11 to the Environmental Board of Review after adoption by the Director and are currently making a Federal Clean Air Act Section 307 challenge of the Ohio Implementation Plan

that the utilities can, in the context of adjudication, make a general challenge of the regulations. This is a mistaken conclusion of law by the Examiners. The scope of an adjudication hearing does not include a challenge of the general reasonableness of the regulation but includes only a challenge of the reasonableness of the particular application of the regulation to the parties involved in the adjudication. This is the conclusion of the *Battles* case (supra), which carefully distinguished between review of regulations in general, which is properly raised through appeal of the rules or declaratory judgment (see the recent decision of *Cincinnati Gas & Electric Co. v. Whitman,* Case No. 74-AP-151, Tenth District Court of Appeals (Franklin Cty., 1974)), and review of regulations as applied. The Hearing Examiners did not abide by the complete holding of the case.

The Hearing Examiners also misconstrued the Agency's intent concerning the intended scope of the adjudication hearing. The Examiners' report errs in inferring from internal Agency memoranda that "the Director views this proceeding as a vehicle for testing the reasonableness of those [ambient sulfur oxides] standards. Therefore, it devolves upon this Hearing Panel to make such an objective determination." Such was not the Director's intent, as a careful reading of those memoranda will clearly show. The document which is apparently referred to is an internal memorandum from Alan Farkas and Stuart Donaldson dated December 19, 1973 (Joint Applicants' Exhibit #48). On the second page of that document, the following statement is made: "However, it was the general consensus of the meeting that the adjudication hearing itself could legitimately be seen as a policy-making process, albeit of a different sort from what we had been used to. One advantage of relying on the adjudication hearing



to provide the substance of policy is that it will allow us to collect information on a level of detail that was not previously available, and thus to fine tune the final orders more effectively than regulations could be." The context in which this sentence appears is a discussion of the merits of adopting new emissions limitations for sulfur oxides—ambient air quality standards are not mentioned in this section of the memorandum. Nor is there any discussion of particulates. Clearly, the problem which this memorandum addressed, and which the Director intended to resolve through the process of the adjudication hearing, was not the general appropriateness of ambient air quality standards and regulations but the question of how an emission limitation calculated for a large region could not be more finely tuned to account for specific peculiarities affecting the emissions from an individual large source such as an electric utility. Nowhere in that memorandum was it stated that the adjudication hearing was regarded as an appropriate forum in which to make a judgment on the appropriateness of air quality standards. This becomes clear upon reading the third page of the same memorandum on which ambient air quality standards are discussed. The Director decided to retain the present state air quality standards for sulfur oxides. This decision, unlike the decision as to regulations on emissions limitations, was *not* to be (and legally could not be) made subject to the decision of an adjudication hearing. Moreover, in no part of the memoranda referred to is there any discussion of the appropriateness of the state's particulates standards or of the possible use of an adjudication hearing to make policy decisions on those standards. The intent of the Director was then, as it is now, to use the adjudication hearing as a means for arriving at a reasonable and lawful enforcement decision

in the particular cases of the parties to the adjudication—which amounts to policy in its specific application rather than to general policy applied to entities throughout the state. Recommendation 6 of the Hearing Panel is therefore rejected.

C. *General Validity of Chapter AP-3, Regulation AP-7-06 and Regulation EP-10*

The Hearing Panel's recommendations concerned both the general validity of Chapter AP-3, Regulation AP-7-06 and Regulation EP-10, and the specific application of those regulations to the electric utilities who are parties to this consolidated case. The Director is not at liberty to address the general validity of his own regulations in the context of this final findings and order. Regulations may be amended or rescinded only through the procedures established in Section 119.03 of the Ohio Revised Code. Thus, the Director must take the Hearing Panel's recommendations relative to the general validity of the Agency's regulations as advisory only. As the Hearing Panel recognized in Recommendation 5, the Director can not act on Recommendations 1 through 4 through an order in this case.

D. *Nitrogen Oxide Control*

Since Regulation AP-7-06 (EP-14-06) applies only to sources in Priority I areas, and since the Federal Administrator has reclassified all the Ohio air quality regions for nitrogen oxide to Priority III, (39 Fed. Reg. 16344, May 8, 1974) Regulation AP-7-06 imposes no control requirements on the sources subject to this adjudication. No further action is necessary by the parties.



E. *Sulfur Oxide Control*

In most cases, the evidence presented by the Joint Applicants and the discussion of it by the Hearing Examiners is quite complete as to the application of sulfur oxides emissions limitations to particular facilities. Because there is an absence of ambient air quality data in the record showing widespread and serious violations of the ambient air quality standards for sulfur oxides, the requirement that applicants must show unreasonableness in the specific application of regulation has been met. Until new ambient air quality data is collected and analyzed showing violations of the regulations by these sources, it is inappropriate to require use of sulfur oxide control by these sources. Thus, for the above reasons, the Director will not require the Electric Utility Companies to implement sulfur oxide control.

F. *Enforcement of Particulate Standards in Chapter AP-3*

In most cases, the specific reasonableness of the application of the particulate regulation was not adequately addressed by the joint utilities. There is a marked paucity of evidence in support of the claim that some of these facilities are not contributing to violations of ambient particulates standards. The joint utilities thus have not met the burden of proof with respect to proving the unreasonableness of applying the particulate regulations to them. Moreover, in most cases, the Hearing Examiners' Report concludes that the installation or upgrading of a particulate control system in individual facilities would not be economically unreasonable or technically infeasible. Thus for these reasons and the reasons set forth in Section IV below the Director will issue orders requiring particulate control. Recommendation 8 of the Hearing Panel is accepted in general terms, the specific orders appearing at the end of this report.

## PART IV

## PARTICULATE CONTROL UNDER THE CLEAN AIR ACT IMPLEMENTATION PLAN

A. *The Director is Compelled under the Federal Clean Air Act Amendments of 1970, 42 USC Section 1857 et seq., to Enforce the Approved Portions of the Ohio Implementation Plan.*

1. *History*

On April 15, 1974, the United States Environmental Protection Agency (U.S. EPA) approved the part of Ohio's Implementation Plan relative to the control of suspended particulates 39 Fed. Reg. 13539 (1974). The Particulate Control standards set forth in the Implementation Plan are identical to the particulate control standards which the Ohio Air Pollution Control Board promulgated in Chapter AP-3 of its regulations, and which were subsequently made regulations of the Ohio EPA by Amended Senate Bill 397.

The Clean Air Act Amendments of 1970 (hereinafter the "Act") established a complex system whereby the jurisdiction to control air pollution was divided between the state and federal governments. Certain aspects of the air pollution control effort were vested in the states subject to U.S. EPA supervision. Thus the role of the U.S. EPA in relation to the states is cooperation, supplementation and supervision. The legislative intent of this scheme was to ensure the achievement of national ambient air quality standards while, at the same time, provide a means to respond to local air pollution goals and problems.

Section 109 of the Act, 42 U.S.C. Section 1957c-4(a) mandated the Administrator to establish national primary ambient air quality standards to protect the public health



and national secondary standards to protect the public welfare. These standards set forth the maximum concentrations of air pollutants permitted in the ambient air. Because each state has unique air pollution problems, the Act gave the states primary responsibility to determine the means by which the National Ambient Air Quality Standards would be implemented. Section 110 of the Act, 42 U.S.C. Section 1957c-5, mandated that each state, after reasonable notice and public hearing, adopt and submit to the Administrator a plan which would provide for implementation, maintenance and enforcement of the National Air Quality Standards. After the plan is submitted by the state, the Administrator may approve or disapprove it in whole or in part. After a plan is approved it becomes enforceable by both the state and the federal governments:

> All approved regulatory provisions of each plan are incorporated by reference in this part. Regulatory provisions of a plan approved or promulgated by the Administrator are enforceable by the Administrator and the State, and by local agencies in accordance with their assigned responsibilities under the plan. 40 CFR Section 52.02(d).

2. *The Director, Acting in His Judicial Capacity, Has Under the Supremacy Clause of the United States Constitution a Duty to Apply Federal Law.*

The United States Supreme Court in *Testa v. Katt*, 330 U.S. 386 (1947), made it clear that article VI section 2 of the United States Constitution ("supremacy clause") prevents a state court from refusing to enforce federal law if the state court has "adequate and appropriate" jurisdiction under local law to adjudicate the matter being enforced. The precise question of whether a state government is required to enforce the terms of a federally adopted

state implementation plan was litigated in a recent case in the U.S. Court of Appeals for the third circuit *Commonwealth of Pennsylvania v. U.S. EPA,* 6 ERC 1776 (3rd Cir. 1974). In that case the U.S. EPA, pursuant to Section 110(c)(2) of the Act, 42 U.S.C. Section 1857c-5(c)(2), promulgated a transportation control plan for the state of Pennsylvania. Pennsylvania then sought review under Section 307(b) of the Act alleging, in part, that the U.S. EPA could not constitutionally compel the State to enforce the federally adopted plan.

Before addressing itself to the constitutional issues, the court thoroughly examined the legislative history behind the Clean Air Act Amendments of 1970 to determine whether Congress intended to require the states to enforce implementation plans and to subject the states to federal sanctions if the conditions of the plan are not met. The court concluded that:

> . . . In sum, Congress clearly contemplated that states could be required to implement a transportation control plan, and thus the Administrator's action in promulgating regulations containing such a requirement for the Commonwealth and applying federal enforcement procedures to it was within his statutory authority. supra at 1777, 1778

After examining the policy and the case law under the federal commerce power the court upheld the constitutionality of the Administrator's action. On page 1780 of the opinion the court said:

> After careful consideration, we do not find that the implementation plan here under attack conflicts with the proper functioning of the system of federalism embodied in our Constitution. It is true, of course, that such enforcement may be financially burdensome,



> but that fact is irrelevant, for "when Congress does act [under the commerce power], it may place new or even enormous fiscal burdens on the States." *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, supra* at 824 [411 U.S. 279 (1973)]. It is also true that compliance with the plan will require the Commonwealth to exercise its legislative and administrative powers, for that is the means by which a state regulates its transportation system. However, it must not be forgotten that when dealing with the commerce power, "we are guided by practical considerations." *Overstreet v. North Shore Corp.,* 318 U.S. 125, 128 (1943) . . . (supra at 1780)

The court's conclusion was that

> . . . the application of the federal enforcement procedures to the Commonwealth for noncompliance with the regulations contained in the Pennsylvania Transportation Control Plan is a valid exercise of the federal commerce power . . . (supra at 1780)

3. *The Director is Bound Under Ohio Law to Comply with the Provisions of the Federal Clean Air Act Amendments of 1970.*

In 1971, the Ohio General Assembly extensively revised Chapter 3704 of the Ohio Revised Code for the express purpose of putting Ohio into compliance with the Clean Air Act, as amended in 1970. Substitute Senate Bill No. 370 was entitled "An Act to amend sections . . . of the Revised Code relative to the prevention, control, and abatement of air pollution, and to declare an emergency." Subsection 4 of SB No. 370 provides:

> This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the fact that *immediate action is necessary in order to comply with the 1970 amendments to the Federal Clean Air Act.* Therefore this act shall go into immediate effect. (emphasis added)

The General Assembly's intent is further demonstrated by Ohio Revised Code Section 3745.01(A). The Section grants the Director power under relevant pollution control laws and regulations to:

> Provide such methods of administration, appoint such personnel, make such reports, and take *such other action as may be necessary to comply with the requirements of the federal laws and regulations pertaining to air* and water *pollution control,* public water supply, water resource planning, and waste disposal and treatment. (emphasis added)

Thus, the paramount purpose of the 1970 Ohio Legislation and one purpose of ORC Sec. 3745.01 is to comply with the Federal Clean Air Act.

4. *If the Director Does not Uphold the Terms of the Approved Portion of the State Implementation Plan He can be Subject to Federal Orders under Section 113(a) (1) and (2) of the Act and to Criminal Penalites under Section 113(c) of the Act.*

Any portion of an implementation plan that is approved by the Administrator is directly enforceable by the Administrator under Section 113 of the Act against any violator of the plan, including against the states, thirty days after a violation is discovered:



> (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding.
>
> If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).
>
> (2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as 'period of Federally assumed enforcement'), the Administrator may enforce any requirement of such plan with respect to any person . . . 42 U.S.C. Section 1857c-8(a)

If the Director fails to obey an order issued by the Administrator he may be subject to extensive criminal sanctions. Section 113(c) of the Act says:

> (c) (1) Any person who knowingly—
>
> (A) violates any requirement of an applicable implementation plan (1) during any period of Fed-

erally assumed enforcement, (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

(C) violates section 111(e) or section 112(c), shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both . . . 42 U.S.C.A. Sec. 1857c-8(c)

5. *Section 307(b) of the Act Bars Parties from Contesting the Administrator's Action Approving the Implementation Plan in an Enforcement Proceeding.*

Under Section 307 of the Act, 42 U.S.C. Section 1857h-5(b), those persons who object to the Administrator's action adopting an implementation plan must do so in a United States Court of Appeals within 30 days of approval or forever be barred from objecting to the Administrator's action:

(1) . . . A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such



promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(a) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. 42 U.S.C. Section 1857h-5(b)

Thus, Section 307 of the Act prevents parties from asserting the same kind of arguments against federal regulations during state adjudication hearings as were asserted against state regulations in these consolidated cases. Such attacks against federal regulations must be made in a United States Court of Appeals through the procedures established in Section 307.

C. *The Sources Subject to this Adjudication Shall be Required to Comply with the Particulate Emission Requirements of Chapter AP-3.*

For the reasons outlined above, the Director is legally obligated to issue orders requiring the sources subject to this adjudication to comply with the particulate regulations set out in Chapter AP-3 of the Regulations of the Ohio Environmental Protection Agency, which are a part of the approved State Implementation Plan for Ohio. The Director recognizes that the record in this case demonstrates that compliance by July 1, 1975, is physically impossible in light of the time required for design, construction, and installation of the necessary control equipment. The Clean Air Act Amendments of 1970, as implemented by the Administrator of the U.S. EPA provide for two alternative ways of dealing with this problem:

(1) Section 110(f) of the Clean Air Act provides for extensions of up to one year beyond the final

SIP compliance date for any source or class of sources upon request by the Governor of Ohio in appropriate circumstances. The Federal regulations governing the application of this Section require a Federal hearing on the appropriateness of this extension, and the extension itself is limited to not more than one year. Such extensions may be renewed, however.

(2) Section 113(a) allows the Administrator to issue orders requiring compliance with the requirements of State Implementation Plans, and such orders must "specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." Section 113(a)(4). The Administrator has developed a practice of issuing consent orders under this section in circumstances where additional time is necessary to comply with the requirements of a State Implementation Plan.

Whether a State official may exercise similar latitude in issuing enforcement orders after a hearing on the record has been questioned in light of the language of the regulations promulgated by the Administrator in 39 Fed. Reg. 34533 (September 26, 1974), which provides in part as follows:

> Enabling authority relating to the issuance of enforcement orders, variances, or other state-initiated measures designed to defer compliance with a plan requirement which is necessary for attainment of a national standard shall specifically provide for consistency with the following requirements.
>
> (1) Except as provided in paragraph (g)(2) [referring to Section 110(f) procedures] of this section compliance may not be deferred beyond the applicable attainment date specified in Part 52 of this chapter. [i.e., the attainment dates established in the State Implementation Plan.]



Since the orders being issued in this case grow out of a record adjudicative proceeding requested by the permit applicants to challenge schedules initiated by the Director, it is the Director's conclusion that the orders below are not "state-initiated," and therefore fall outside the scope of the September 26, 1974, Federal Register requirements. In any case, the Director has consulted with U.S. EPA on the availability and appropriateness of Consent Orders in these circumstances, and he will formally request the issuance by U.S. EPA of Consent Orders under Section 113(a) embodying the requirements of the attached orders.

*ORDER*

Pursuant to Chapters 119 and 3704(S) of the Ohio Revised Code the Director makes the following orders:

(1) For the reasons stated in the Hearing Examiners' Report, the ruling of the Hearing Panel on the status of the Public Utilities Commission of Ohio as a party to this proceeding is hereby affirmed.

(2) All sources currently in compliance with the requirements governing particulates of Chapter AP-3 of the Regulations of the Ohio Environmental Protection Agency, which are a part of the approved Ohio Implementation Plan, are hereby issued the attached Permits to Operate, subject to the conditions specified therein.

(3) All sources which pertain to the entities listed below and which are not issued Permits to Operate under (2) above are hereby ordered to take the following steps by the dates indicated:

(A) By April 15, 1975, submit a program and schedule for compliance with the particulate regulations of Chapter AP-3 that demonstrates compliance as quickly as possible and before April 15, 1977.

(B) By June 15, 1975, submit signed contracts for the purchase and delivery as quickly as possible of all necessary control equipment for those sources needing control equipment under the programs and schedules submitted under the requirement of paragraph (2) above.

(C) By April 15, 1977, attain final compliance with all particulate regulations of Chapter AP-3 of the Regulations of the Ohio Environmental Protection Agency.

Buckeye Power—
Cardinal

Cincinnati Gas & Electric—
Miami Fort
W. C. Beckjord

Cleveland Electric Illuminating—
Lake Shore
Ashtabula
Avon Lake
Eastlake

Columbus and Southern Ohio—
Conesville
Poston
Picway (Unit #9)

Dayton Power and Light—
Tait



Ohio Edison—
Gorge
Burger
Toronto
Sammis
Niles
Edgewater

Ohio Power—
Muskingum
Cardinal

Ohio Valley Electric—
Kyger Creek

Toledo Edison—
Bay Shore
Acme

City of Cleveland

City of Painesville

(4) The sources listed below may submit phase out programs as an alternative to compliance with Order (3) above. If phase out is not chosen, the terms of Order (3) apply. All phase out schedules must be submitted by April 15, 1975. Schedules will provide for necessary approvals from the Public Utilities Commission of Ohio by April 15, 1976. Phase out must be accomplished by April 15, 1977.

Columbus and Southern Ohio Electric—
Picway (Units 7 & 8)

East Palestine Light and Power

Ohio Edison—
Beech Street
Rockaway

North Avenue
Mad River
Norwalk

Ohio Power—

Woodcock
Philo
Tidd

Toledo Edison—

Acme

(5) The Dover Municipal Power Plant shall submit particulate control program or evidence of purchase of standby power by April 15, 1975. If a particulate control program is selected, this facility shall be subject to the conditions of Order (3) above.

/s/ IRA L. WHITMAN — December 12, 1974
Ira L. Whitman — Date
*Director*

## APPENDIX H

**Pertinent Excerpts From the Findings of Fact, Conclusions of Law and Recommendations of the Hearing Panel of the Ohio Environmental Protection Agency Dated September 6, 1974.**

BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY

September 6, 1974

Case No. 73-A-P-120, et al

**In the Matter of Consolidated Electric Utility Cases**

Attached hereto is a copy of the Hearing Examiners' Report and Recommendations in the above matter. Pursuant to Ohio Revised Code Section 119.09, any party to this matter may file written objections within ten (10) days of receipt of a copy of the Report. Written objections should be filed with:

Hearing Clerk
Ohio Environmental Protection Agency
Room 506
361 East Broad Street
Columbus, Ohio 43215

If objections are filed, an original plus two (2) copies are required.

**Examiners' Report and Recommendations**

HARVEY ROSENZWEIG
*Chief Hearing Examiner*

PATRICIA BROWN
*Hearing Examiner*

ALAN LAPP
*Hearing Examiner*



FINDINGS OF FACT

GENERAL CASE

1. Applicants filed applications for variances or operating permits which were acted upon by the Director in May, 1973.
2. Requests for adjudication hearings were filed to challenge these actions. Four citizen objectors were also parties to certain cases.
3. The consolidated hearing in this matter commenced on March 4, 1974.
4. Ohio EPA's previous ambient air quality standards for sulfur dioxide and particulate matter were equivalent to the Federal secondary ambient air quality standards for those pollutants as published in the April 30, 1971 Federal Register.
5. The Federal secondary annual average and maximum 24 hour ambient air quality standards for sulfur dioxide were revoked by USEPA on September 14, 1973 because insufficient support was found in available data to require their retention in order to protect the public welfare.
6. On January 21, 1974 Ohio EPA adopted new ambient air quality standards for sulfur dioxide which included the annual average and maximum 24 hour secondary standards previously revoked by USEPA.
7. Epidemiological and toxicological studies demonstrate that sulfur dioxide and particulate matter can produce adverse health effects over a wide range of concentrations.
8. Sulfur dioxide effects upon vegetation are minor compared to effects from other natural causes. Adverse effects are produced by short-term fumigations for periods less than 24 hours.

9. Experts agree that the present Federal primary ambient annual average and 24 hour standards for sulfur dioxide and particulate matter are adequate to protect public health.

10. Ohio's present ambient annual average and 24 hour standards for sulfur dioxide and particulate matter are too stringent and their attainment is not necessary to protect public health.

11. Utilization of a "worst region" approach for classification of geographic areas of the state for purposes of emission control is overly simplistic and produces unnecessary overkill.

12. Utilization of a proportional reduction or "rollback" technique to develop emission limitations ignores significant factors affecting the relationship between levels of emissions and ambient concentrations thereby resulting in unnecessary overkill.

13. Utilization of diffusion modeling buttressed by ambient monitoring data to develop emission limitations permits control of emissions where necessary to produce the desired air quality.

14. Ambient monitoring data gathered by local air pollution control agencies during 1973 demonstrates no need for control of sulfur dioxide emissions in many parts of the State.

15. The availability of flue gas desulfurization as an $SO_2$ control method which can be employed by the Ohio electric utilities must be shown by an adequate demonstration of an FGD system.

16. An adequate demonstration of an FGD system is the reasonably continuous operation of such system for a period of one year on a boiler of approximately 100 mw.



17. The furnace injection, lime/limestone scrubbing, catalytic oxidation, magnesium oxide, Wellman-Lord FGD systems have not been so demonstrated.

18. Full scale demonstrations of the Chemico lime scrubbing system at Bruce Mansfield and the Wellman-Lord scrubbing system at NIPSCO are scheduled to commence in early 1975.

19. Limestone of "near high calcium" quality, having a chemical makeup of at least 90% calcium carbonate, less than 1% magnesium oxide, and less than 1% insolubles in hydrochloric acid, is the most suitable grade for use in limestone based flue gas desulfurization processes, with four million tons required per year for power plants in Ohio.

20. Although there are significant deposits of limestone in Ohio and neighboring states, factors such as chemical inconsistency, accessibility, competition from other users, necessary lead time for production, and zoning and reclamation laws influence the quantity of the necessary grade of stone available for flue gas scrubbing.

21. Limestone base price will be as much as $5.75 per ton, with transportation rates being in the range of .25¢ per ton/mile to 10¢ per ton/mile.

22. Limestone meeting the specifications for use in flue gas scrubbing processes is not available in sufficient quantities.

23. The installation of an individual FGD system would require a period of three and a half years for the completion of all engineering and construction, and the commencement of commercial operation.

24. Potential FGD vendor capacity and anticipated FGD demand preclude the installation of FGD systems by the Ohio electric utilities prior to July, 1978.

25. The operation of certain FGD systems produces a waste sludge which must be disposed of in an environmentally acceptable manner.

26. The disposal of untreated FGD scrubber sludge cannot be accomplished in an environmentally acceptable manner.

27. Chemical fixation of industrial sludge has been demonstrated to be an available, feasible technology, which is translatable to FGD scrubber sludge applications.

28. Chemical fixation of FGD scrubber sludge renders such sludge suitable for environmentally acceptable disposal.

29. A capital investment of greater than $60.00 per kw for FGD installation, including the purchase of limestone and scrubber sludge disposal when necessary, is economically unreasonable unless counterbalanced by significant adverse effects from emissions.

30. Tall stacks, taking into account the effective stack height, can be designed to permit dispersion and dilution of $SO_2$ emissions to meet required ambient air concentrations under most conditions.

31. Ground level ambient $SO_2$ concentrations are affected more by emission sources having short stacks than by sources emitting through chimneys having large effective stack height.

32. Tall stacks generally can be effectively designed to account for adverse topographical and meteorological conditions.

33. Tall stacks, in themselves, are not adequate as a control device for particulate emissions.

34. Tall stacks have not been shown to cause adverse ambient $SO_2$ concentrations at long distances from the source.



35. Supplementary control systems, including load switching and/or use of low sulfur fuel, can be effectively used in conjunction with tall stacks to control ambient $SO_2$ concentrations during short-term adverse meteorological conditions.

36. Ambient air monitoring and meteorological prediction can be effectively used to initiate use of a supplementary control system.

37. Low sulfur natural gas is not available for use by power plant boilers because of scarcity of supply and priority allocations.

38. Low sulfur fuel oil is not available for use in power plant boilers because of scarcity of supply, lack of adequate transportation facilities, and "higher priority" usage.

39. Low sulfur coals, either from the Appalachian area or from the western fields, are not generally available for power plant operations because of increased demands, lack of mine capacity, boiler reliability in usage of such fuel, lack of transport facilities, increased cost, contractual difficulties, and economic consequences to Ohio coal and related industries.

40. Coal preparation techniques can be utilized to remove an approximate average of 30% of the sulfur content of Ohio-produced coals.

41. There is no conclusive evidence in the record regarding the health effects of secondary pollutants like sulfates.

42. There is no conclusive evidence in the record regarding the ratio for conversion of sulfur dioxide to sulfates.

43. The Administrator of USEPA has not yet promulgated regulations describing a methodology for quantifying the concept of "significant deterioration" of existing air quality.

## Findings of Fact

### Individual Cases

1. Ambient monitoring data collected by local air pollution control agencies and evidence adduced herein regarding the impact of an individual plant's $SO_2$ emissions upon ambient concentrations demonstrates that there is no need for control of $SO_2$ emissions at the following generating stations:

Cleveland Electric Illuminating
- Lakeshore
- Eastlake
- Avon Lake

Cincinnati Gas and Electric
- W. C. Beckjord
- Miami Fort
- West End

Dayton Power and Light
- Frank M. Tait
- Third Street

Toledo Edison
- Acme
- Bay Shore
- Water Street

Ohio Edison
- Burger
- Edgewater
- Gorge
- Beech Street
- Mad River
- Toronto
- Rockaway
- North Avenue



Ohio Power
- Tidd
- Cardinal

Buckeye Power
- Cardinal

City of Cleveland
- Lake Road

City of Painesville

2. Ambient monitoring data collected by applicants or predictive modeling relating an individual plant's $SO_2$ emissions to predicted or actual $SO_2$ concentrations in the area additionally demonstrates that there is no need for installation of $SO_2$ emissions control systems at the following generating stations:

Cleveland Electric Illuminating
- Ashtabula

Columbus and Southern Ohio
- Conesville
- Picway
- Poston

3. The combined costs for installation of FGD systems and sludge disposal facilities at the following generating stations are unreasonable unless counterbalanced by significant adverse effects from $SO_2$ emissions:

Cleveland Electric Illuminating
- Lakeshore
- Eastlake
- Ashtabula
- Avon Lake

Columbus and Southern Ohio
- Conesville
- Poston
- Picway

Cincinnati Gas and Electric
W. C. Beckjord
Miami Fort

Dayton Power and Light
Frank M. Tait

Toledo Edison
Acme
Bay Shore

Ohio Edison
Sammis
Burger
Toronto
Edgewater
Gorge
Mad River
Niles

Ohio Power
Woodcock
Muskingum
Cardinal

Buckeye Power
Cardinal

City of East Palestine

City of Dover

4. Lack of available space for installation of FGD systems and/or sludge disposal facilities renders a requirement for their installation unreasonable at the following generating stations unless counterbalanced by significant adverse effects from $SO_2$ emissions:

Cleveland Electric Illuminating
Lakeshore
Eastlake



Cincinnati Gas and Electric
W. C. Beckjord
Miami Fort

Dayton Power and Light
Frank M. Tait

Toledo Edison
Acme
Bay Shore
Water Street

Ohio Power
Cardinal

Buckeye Power
Cardinal

City of East Palestine

City of Dover

5. It is technically feasible to insure that sulfur content of coal used does not exceed 3% at the following generating stations:

Cleveland Electric Illuminating
Ashtabula
Avon Lake

Columbus and Southern Ohio
Picway

Cincinnati Gas and Electric
Miami Fort

Dayton Power and Light
Frank M. Tait

Toledo Edison
Acme
Bay Shore

Ohio Edison
Edgewater
Gorge
Beech Street

Ohio Power
Tidd

Ohio Valley Electric
Kyger Creek

6. Imposition of a requirement for new or upgraded particulate control equipment is unreasonable for the following generating stations due to prohibitive costs or planned phase out of operating equipment:

Columbus and Southern Ohio
Picway (Units 7 and 8)

Dayton Power and Light
Third Street

Ohio Edison
Norwalk
Mad River
Beech Street
North Avenue
Rockaway

Ohio Power
Woodcock
Philo
Tidd

City of East Palestine

City of Dover



## Conclusions of Law

1. Applicants bear the burden of proof with regard to the following issues: technical feasibility and economic reasonableness of FGD systems, adequacy of limestone supplies, ability to dispose of scrubber sludge, availability of low sulfur fuel, reasonableness of ambient standards and emission limitations.

2. Ohio EPA bears the burden of proof with regard to the following issues: adverse effects of secondary pollutants, relationship of use of tall stacks to formation of secondary pollutants and significant deterioration of air quality in adjoining areas.

3. In determining the reasonableness or legality of a regulation as it applies to a particular set of facts or circumstances pursuant to ORC 119.11 it is proper to consider evidence regarding the appropriateness of the regulation in light of the objectives it seeks to attain.

4. Ohio's ambient air quality standards are intended to achieve the goal of protecting human health and welfare from the adverse effects of pollutants.

5. Ohio's emission standards are intended to achieve the goal of limiting emissions to such a degree that, considering topography, prevailing wind directions, duration and frequency of the presence of the pollutants in the ambient air and other relevant factors, the required ambient levels are achieved.

6. The Federal government has preempted the area of setting primary ambient air quality standards and Ohio may not at this time adopt less stringent ambient standards.

7. Ohio's present ambient annual average and maximum 24 hour standards for sulfur dioxide and particulate matter place an unreasonable burden of compliance upon applicants herein.

8. Ohio's present ambient 3 hour standard for sulfur dioxide was not lawfully enacted and it must be considered a nullity insofar as these proceedings are concerned.

9. Ohio's present priority classifications for sulfur dioxide and particulate matter are not based upon ambient data or sophisticated modeling and place an unreasonable burden of compliance upon applicants herein.

10. Ohio's present emission limitations for sulfur dioxide particulate matter and nitrogen oxides are more stringent than necessary to attain the appropriate ambient levels and they place an unreasonable burden of compliance upon applicants herein.

11. Ohio EPA may not justify requiring compliance with unreasonable regulations by reference to portions of the Clean Air Act requiring promulgation of these regulations within very brief time periods.

12. The term "emission limitation", as used in Section 110 of the Clean Air Act, means a limitation upon emissions which exceed that level of emissions released at the maximum effective stack height when considering the worst possible effects of meteorology and topography as well as maximum content in fuel of sulfur or other pollutants which will not prevent attainment of the appropriate air quality standard.

13. Ohio EPA may develop control strategies for applicants herein which take into account stack height, meteorology, topography and other relevant factors and thereby comply with the requirement of Section 110 of the Clean Air Act.

14. The direct and indirect economic costs of compliance with emission regulations must be balanced against the benefits to be obtained from compliance in order to determine if it is reasonable to require compliance.



15. Flue gas desulfurization is not a presently available, technologically feasible method of $SO_2$ control which may be employed by the Ohio electric utilities.

16. Chemical fixation of FGD scrubber sludge is a presently available, technologically feasible method of FGD scrubber sludge treatment which may be employed by the Ohio electric utilities.

17. Tall stacks, either alone or in combination with supplementary control systems, are a technologically feasible and economically reasonable means of meeting ambient air quality standards for sulfur dioxide.

18. Overall conversion to low sulfur fuels by the electric utilities is not technologically feasible or economically reasonable.

19. Regulation EP-10-06 (AP-2-06) is unclear and does not adequately address potential air pollution control equipment malfunctions.

20. The date upon which the Administrator of USEPA lawfully approves a State Implementation Plan is the starting point for computation of the three-year compliance period which the Clean Air Act provides for compliance with primary ambient air quality standards.

21. Ohio's Implementation Plan, minus a sulfur oxide control strategy, was lawfully approved by the Administrator for the first time on April 15, 1974.

22. The ultimate date for compliance with Ohio's emission limitations relative to particulate matter is April 15, 1977.

23. The evidence in this record regarding the formation and health effects of secondary pollutants and the parameters of "significant deterioration" of air quality does not provide a probative basis for approval or

rejection of any particular method for emission limitation.

24. The criteria for issuance of orders pursuant to ORC Section 3704.03(S) to prohibit or abate unlawful emissions embody the criteria for issuance of variances set forth in ORC Section 3704.03(H).

25. Issuance of an order pursuant to ORC Section 3704.03 (S) to require applicants herein to abate emissions, where necessary, by a date certain is a proper method for resolving the controversies herein.

26. Regulation AP-7-06 limiting emissions of nitrogen oxides is presently unnecessary.

RECOMMENDATIONS

1. The Hearing Panel recommends that the Director adopt the present Federal primary annual average and twenty-four hour maximum ambient air quality standards for sulfur dioxide and particulate matter and repeal Ohio's existing ambient standards for those pollutants.

2. The Hearing Panel recommends that the Director adopt a county by county classification and realistic emission limitations upon emissions of sulfur dioxide and particulate matter based upon accurate ambient data for each county and the most sophisticated diffusion modeling techniques presently available. Existing priority classifications and emission regulations for these pollutants should be repealed.

3. The Hearing Panel recommends that Regulation AP-7-06 be repealed.

4. The Hearing Panel recommends that the Director repeal Regulation EP-10-06 and adopt a new regulation clearly expressing the means for attaining the objectives which the present regulation seeks to attain.



5. Recommendations 1-4 should be implemented through utilization of ORC Chapter 119 rule-making procedures.

6. The Hearing Panel recommends that no compliance orders be issued as a result of this proceeding until Recommendations 1-4 have been implemented.

7. In the event that the Director should determine that installation of FGD systems appears necessary at any plant involved herein, the Hearing Panel recommends that the Director obtain information regarding the Bruce Mansfield and NIPSCO scrubber systems in 1976 before issuing the draft order attached hereto.

8. In the event that the Director determines that particulate control measures must be implemented now, the Hearing Panel recommends issuance of the draft order attached hereto.

/s/ HARVEY A. ROSENZWEIG
Harvey A. Rosenzweig
Chief Hearing Examiner

/s/ PATRICIA L. BROWN
Patricia L. Brown
Hearing Examiner

/s/ ALAN L. LAPP
Alan L. Lapp
Hearing Examiner

## APPENDIX I

**The Fourteenth Amendment to the United States Constitution.**

**Amendment XIV.—Citizenship: Privileges and Immunities: Due Process: Equal Protection: Apportionment of Representation: Disqualification of Officers: Public Debt: Enforcement**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each States, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid

or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## APPENDIX J

**Pertinent Provisions of the Clean Air Act, as Amended, 42 U.S.C. §§ 7401 *et seq.***

**§ 7410. State implementation plans for national primary and secondary ambient air quality standards**

*Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems*

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practical but (subject to subsection (e) of this sec-

tion) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting



any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 7428 of this title;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after August



7, 1977) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under sec-

tion 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under section 7410(f) or (g) of this title (relating to temporary energy or economic authority) or orders under section 7419 of this title (relating to primary nonferrous smelters) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, extensions, or variances had been granted.

(D) Any applicable implementation plan for which an attainment date later than December 31, 1982, is provided to section 7502(a)(2) of this title shall be revised by July 1, 1979, to include the comprehensive measures and requirements referred to in subsection (c)(5)(B) of this section.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 7411 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.



(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purposes of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the

emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program."

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

*Extension of period for submission of plans*

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.



*Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation*

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 shall not be required to be promulgated before the date eight months after such date required for submission.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after June 22, 1974, on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void on June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.



(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) In the case of any applicable implementation plan containing measures requiring—

(A) retrofits on other than commercially owned in-use vehicles,

(B) gas rationing which the Administrator finds would have seriously disruptive and widespread economic or social effects, or

(C) the reduction of the supply of on-street parking spaces,

the Governor of the State may, after notice and opportunity for public hearing, temporarily suspend such measures notwithstanding the requirements of this section until January 1, 1979, or the date on which a plan revision under subsection (a)(2)(I) of this section is submitted, whichever is earlier. No such suspension shall be granted unless the State agrees to prepare, adopt, and submit such plan revision as determined by the Administrator.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).



(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures (including the written evidence required by part D of this subchapter), to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

*Applicable implementation plan*

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

*Extension of time period for attainment of national primary ambient air quality standard in implementation plan; procedure; approval of extension by Administrator*

(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) of this section for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to premit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.



*National or regional energy emergencies; determination by President*

(f)(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 7419 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

*Governor's authority to issue temporary emergency suspensions*

(g)(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and



which the Administrator has not approved or disapproved under this section within the required four month period, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 7419 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

*Annual publications of comprehensive document for each State setting forth requirements of applicable implementation plan*

(h)(1) Not later than one year after August 7, 1977, and annually thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents. Each such

document shall be revised as frequently as practicable but not less often than annually.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

*Modification of requirements prohibited*

(i) Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

*Technological systems of continuous emission reduction on new or modified stationary source; compliance with performance standards*

(j) As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.



**§ 7413. Federal enforcement procedures**

*Finding of violation; notice; compliance order; civil action; State failure to enforce plan; construction or modification of major stationary sources*

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in viola-

tion of section 7411(e) of this title (relating to new source performance standards), section 7412(c) of this title (relating to standards for hazardous emissions), or section 119 (g) (relating to energy-related authorities) is in violation of any requirement of section 7414 of this title (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section.

(4) An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith effort to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(5) Whenever, on the basis of information available to him, the Administrator finds that a State is not acting in compliance with any requirement of the regulation referred to in section 129(a)(1) of the Clean Air Act Amendments of 1977 (relating to certain interpretative regulations) or any plan provisions required under section 7410(a)(2)(I) of this title and part D of this subchapter, he may issue an order prohibiting the construction or modification of any major stationary source in any area to which such provisions apply or he may bring a civil action under subsection (b)(5) of this section.



*Violations by owners or operators of major stationary sources*

(b) The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirements of an applicable implementation plan (A) during any period of Federally assumed enforcement, or

(B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement; or

(3) violates section 7411(e) of this title, section 7412(c) of this title, section 119(g) (as in effect before August 7, 1977), subsection (d)(5) of this section (relating to coal conversion), section 7624 of this title (relating to cost of certain vapor recovery), section 7419 of this title (relating to smelter orders), or any regulation under part B of this subchapter (relating to ozone); or

(4) fails or refuses to comply with any requirement of section 7414 of this title or subsection (d )of this section; or

(5) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

The Administrator may commence a civil action for recovery of any noncompliance penalty under section 7420 of

this title or for recovery of any nonpayment penalty for which any person is liable under section 7420 of this title or for both. Any action under this subsection may be brought in the district court of the United States for the district in which the violation occurred or in which the defendant resides or has his principal place of business, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty and to collect any noncompliance penalty (and nonpayment penalty) owed under section 7420 of this title. In determining the amount of any civil penalty to be assessed under this subsection, the courts shall take into consideration( in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.

*Penalties*

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order under section 7419 of this title or under subsection (a) or (d) of this section, or

(C) violates section 7411(e), section 7412(c) of this title; or



(D) violates any requirement of section 119(g) (as in effect before August 7, 1977), subsection (b)(7) or (d)(5) of section 7420 of this title (relating to noncompliance penalties), or any requirement of part B of this subchapter (relating to ozone).

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter; shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

*Final compliance orders*

(d)(1) A State (or, after thirty days notice to the State, the Administrator) may issue to any stationary source which is unable to comply with any requirement of an applicable implementation plan an order which specifies a date for final compliance with such requirement later than the date for attainment of any national ambient air quality standard specified in such plan if—

(A) such order is issued after notice to the public (and, as appropriate, to the Administrator) containing

the content of the proposed order and opportunity for public hearing;

(B) the order contains a schedule and timetable for compliance;

(C) the order requires compliance with applicable interim requirements as provided in paragraph (5)(B) (relating to sources converting to coal), and paragraph (6) and (7) (relating to all sources receiving such orders) and requires the emission monitoring and reporting by the source authorized to be required under sections 7410(a)(2)(F) and 7414(a)(1) of this title;

(D) the order provides for final compliance with the the requirement of the applicable implementation plan as expeditiously as practicable, but (except as provided in paragraph (4) or (5)) in no event later than July 1, 1979, or three years after the date for final compliance with such requirement specified in such plan, whichever is later; and

(E) in the case of a major stationary source, the order notifies the source that, unless exempted under section 120(a)(2)(B) or (C), it will be required to pay a noncompliance penalty effective July 1, 1979, as provided under section 7420 of this title or by such later date as is set forth in the order in accordance with section 7420(b)(3) or (g) of this title in the event such source fails to achieve final compliance by July 1, 1979.

(2) In the case of any major stationary source, no such order issued by the State shall take effect until the Administrator determines that such order has been issued in accordance with the requirements of this chapter. The Administrator shall determine, not later than 90 days after receipt of notice of the issuance of an order under this subsection with respect to any major stationary source, whether or



not any State order under this subsection is in accordance with the requirements of this chapter. In the case of any source other than a major stationary source, such order issued by the State shall cease to be effective upon a determination by the Administrator that it was not issued in accordance with the requirements of this chapter. If the Administrator so objects, he shall simultaneously proceed to issue an enforcement order in accordance with subsection (a) of this section or an order under this subsection. Nothing in this section shall be construed as limiting the authority of a State or political subdivision to adopt and enforce a more stringent emission limitation or more expeditious schedule or timetable for compliance than that contained in an order by the Administrator.

(3) If any source not in compliance with any requirement of an applicable implementation plan gives written notification to the State (or the Administator) that such source intends to comply by means of replacement of the facility, a complete change in production process, or a termination of operation, the State (or the Administrator) may issue an order under paragraph (1) of this subsection permitting the source to operate until July 1, 1979, without any interim schedule of compliance: *Provided,* That as a condition of the issuance of any such order, the owner or operator of such source shall post a bond or other surety in an amount equal to the cost of actual compliance by such facility and any economic value which may accrue to the owner or operator of such source by reason of the failure to comply. If a source for which the bond or other surety required by this paragraph has been posted fails to replace the facility, change the production process, or terminate the operations as specified in the order by the required date, the owner or operator shall immediately forfeit on the bond or other surety and the State (or the Administrator) shall have no discretion to modify the order under this paragraph or to compromise the bond or other surety.

(4) An order under paragraph (1) of this subsection may be issued to an existing stationary source if—

(A) the source will expeditiously use new means of emission limitation which the Administrator determines is likely to be adequately demonstrated (within the meaning of section 7411(a)(1)) of this title upon expiration of the order,

(B) such new means of emission limitation is not likely to be used by such source unless an order is granted under this subsection.

(C) such new means of emission limitation is determined by the Administrator to have a substantial likehood of—

(i) achieving greater continuous emission reduction than the means of emission limitation which, but for such order, would be required; or

(ii) achieving an equivalent continuous reduction at lower cost in terms of energy, economic, or nonair quality environmental impact; and

(D) compliance by the source with the requirement of the applicable implementation plan would be impracticable prior to, or during, the installation of such new means.

Such an order shall provide for final compliance with the requirement in the applicable implementation plan as expeditiously as practicable, but in no event later than five years after the date on which the source would otherwise be required to be in full compliance with the requirement.

(5)(A) In the case of a major stationary source which is burning petroleum products or natural gas, or both and which—

(i) is prohibited from doing so under an order pursuant to the provisions of section 792(a) of Title 15 or



any amendment thereto, or any subsequent enactment which supersedes such provisions, or

(ii) within one year after August 7, 1977, gives notice of intent to convert to coal as its primary energy source because of actual or anticipated curtailment of natural gas supplies under any curtailment plan or schedule approved by the Federal Power Commission (or, in the case of intrastate natural gas supplies, approved by the appropriate State regulatory commission),

and which thereby would no longer be in compliance with any requirement under an applicable implementation plan, an order may be issued by the Administrator under paragraph (1) of this subsection for such source which specifies a date for final compliance with such requirement as expeditiously as practicable, but not later than December 31, 1980. The Administrator may issue an additional order under paragraph (1) of this subsection for such source providing an additional period for such source to come into compliance with the requirement in the applicable implementation plan, which shall be as expeditiously as practicable, but in no event later than five years after the date required for compliance under the preceding sentence.

(B) In issuing an order pursuant to subparagraph (A), the Administrator shall prescribe (and may from time to time modify) emission limitations, requirements respecting pollution characteristics of coal, or other enforceable measures for control of emissions for each source to which such an order applies. Such limitations, requirements, and measures shall be those which the Administrator determines must be complied with by the source in order to assure (throughout the period before the date for final compliance established in the order) that the burning of coal by such source will not result in emissions which cause or contribute to concentrations of any air pollutant in excess of any na-

tional primary ambient air quality standard for such pollutant.

(C) The Administrator may, by regulation, establish priorities under which manufacturers of continuous emission reduction systems necessary to carry out this paragraph shall provide such systems to users thereof, if he finds, after consultation with the States, that priorities must be imposed in order to assure that such systems are first provided to sources subject to orders under this paragraph in air quality control regions in which national primary ambient air quality standards have not been achieved. No regulation under this subparagraph may impair the obligation of any contract entered into before August 7, 1977.

(D) No order issued to a source under this paragraph with respect to an air pollutant shall be effective if the national primary ambient air quality standard with respect to such pollutant is being exceeded at any time in the air quality control region in which such source is located. The preceding sentence shall not apply to a source if, upon submission by any person of evidence satisfactory to the Administrator, the Administrator determines (after notice and public hearing)—

(i) that emissions of such air pollutant from such source will affect only infrequently the air quality concentrations of such pollutant in each portion of the region where such standard is being exceeded at any time;

(ii) that emissions of such air pollutant from such source will have only insignificant effect on the air quality concentrations of such pollutant in each portion of the region where such standard is being exceeded at any time; and



(iii) with reasonable statistical assurances that emissions of such air pollutant from such source will not cause or contribute to air quality concentrations of such pollutant in excess of the national primary ambient air quality standard for such pollutant.

(6) An order issued to a source under this subsection shall set forth compliance schedules containing increments of progress which require compliance with the requirement postponed as expeditiously as practicable.

(7) A source to which an order is issued under paragraph (1), (3), (4), or (5) of this subsection shall use the best practicable system or systems of emission reduction (as determined by the Administrator taking into account the requirement with which the source must ultimately comply) for the period during which such order is in effect and shall comply with such interim requirements as the Administrator determines are reasonable and practicable. Such interim requirements shall include—

(A) such measures as the Administrator determines are necessary to avoid an imminent and substantial endangerment to health of persons, and

(B) a requirement that the source comply with the requirements of the applicable implementation plan during any such period insofar as such source is able to do so (as determined by the Administrator).

(8) Any order under paragraph (1) of this subsection shall be terminated if the Administrator determines on the record, after notice and hearing, that the inability of the source to comply no longer exists. If the owner or operator of the source to which the order is issued demonstrates that prompt termination of such order would result in undue hardship, the termination shall become effective at the earliest practicable date on which such undue hardship

would not result, but in no event later than the date required under this subsection.

(9) If the Administrator determines that a source to which an order is issued under this subsection is in violation of any requirement of this subsection, he shall—

(A) enforce such requirement under subsections (a), (b), or (c) of this section,

(B) (after notice and opportunity for public hearing) revoke such order and enforce compliance with the requirement with respect to which such order was granted,

(C) give notice of noncompliance and commence action under secton 7420 of this title, or

(D) take any appropriate combination of such actions.

(10) During the period of the order in effect under this subsection and where the owner or operator is in compliance with the terms of such order, no Federal enforcement action pursuant to this section and no action under section 7604 of this title shall be pursued against such owner or operator based upon noncompliance during the period the order is in effect with the requirement for the source covered by such order.

(11) For the purposes of section 7410, 7604, and 7607 of this title, any order issued by the State and in effect pursuant to this subsection shall become part of the applicable implementation plan.

(12) Any enforcement order issued under subsection (a) of this section or any consent decree in an enforcement action which is in effect on August 7, 1977, shall remain in effect to the extent that such order or consent decree is (A) not inconsistent with the requirements of this subsection and section 7419 of this title or (B) the administrative



orders on consent issued by the Administrator on November 5, 1975 and February 26, 1976 and requiring compliance with sulfur dioxide emission limitations or standards at least as stringent as those promulgated under section 7411 of this title. Any such enforcement order issued under subsection (a) of this section or consent decree which provides for an extension beyond July 1, 1979, except such administrative orders on consent, is void unless modified under this subsection within one year after August 7, 1977, to comply with the requirements of this subsection.

**§ 7420. Noncompliance penalty**

*Assessment and collection*

(a)(1)(A) Not later than 6 months after August 7, 1977, and after notice and opportunity for a public hearing, the Administrator shall promulgate regulations requiring the assessment and collection of a noncompliance penalty against persons referred to in paragraph (2)(A).

(B)(i) Each State may develop and submit to the Administrator a plan for carrying out this section in such State. If the Administrator finds that the State plan meets the requirements of this section, he may delegate to such State any authority he has to carry out this section.

(ii) Notwithstanding a delegation to a State under clause (i), the Administrator may carry out this section in such State under the circumstances described in subsection (b)(2)(B) of this section.

(2)(A) Except as provided in subparagraph (B) or (C) of this paragraph, the State or the Administrator shall assess and collect a noncompliance penalty against every person who owns or operates—

(i) a major stationary source (other than a primary nonferrous smelter which has received a primary nonferrous smelter order under section 7419 of this title)

which is not in compliance with any emission limitation, emission standard or compliance schedule under any applicable implementation plan (whether or not such source is subject to a Federal or State consent decree), or

(ii) a stationary source which is not in compliance with an emission limitation, emission standard, standard of performance, or other requirement established under section 7411 or 7412 of this title, or

(iii) any source referred to in clause (i) or (ii) (for which an extension, order, or suspension referred to in subparagraph (B), or Federal or State consent decree is in effect), or a primary nonferrous smelter which has received a primary nonferrous smelter order under section 7419 of this title which is not in compliance with any interim emission control requirement or schedule of compliance under such extension, order, suspension, or consent decree

For purposes of subsections (d)(2) of this section, in the case of a penalty assessed with respect to a source referred to in clause (iii) of this subparagraph, the costs referred to in such subsection (d)(2) shall be the economic value of noncompliance with the interim emission control requirement or the remaining steps in the schedule of compliance referred to in such clause.

(B) Notwithstanding the requirements of subparagraph (A)(i) and (ii), the owner or operator of any source shall be exempted from the duty to pay a noncompliance penalty under such requirements with respect to that source if, in accordance with the procedures in subsection (b)(5) of this section, the owner or operator demonstrates that the failure of such source to comply with any such requirements is due solely to—



(i) a conversion by such source from the burning of petroleum products or natural gas, or both, as the permanent primary energy source to the burning of coal pursuant to an order under section 7413(d)(5) of this title or section 7419 of this title (as in effect before August 7, 1977);

(ii) in the case of a coal-burning source granted an extension under the second sentence of section 7419(c)(1) of this title (as in effect before August 7, 1977), a prohibition from using petroleum products or natural gas or both, by reason of an order under the provisions of section 792(a) and (b) of Title 15 or under any legislation which amends or supersedes such provisions;

(iii) the use of innovative technology sanctioned by an enforcement order under section 7413(d)(4) of this title;

(iv) an inability to comply with any such requirement, for which inability the source has received an order under section 7413(d) of this title (or an order under section 7413 of this title issued before August 7, 1977) which has the effect of permitting a delay or violation of any requirement of this chapter (including a requirement of an applicable implementation plan) which inability results from reasons entirely beyond the control of the owner or operator of such source or of any entity controlling, controlled by, or under common control with the owner or operator of such source; or

(v) the conditions by reason of which a temporary emergency suspension is authorized under section 7410 (f) or (g) of this title.

An exemption under this subparagraph shall cease to be effective if the source fails to comply with the interim emission control requirements or schedules of compliance (in-

cluding increments of progress) under any such extension, order, or suspension.

(C) The Administrator may, after notice and opportunity for public hearing, exempt any source from the requirements of this section with respect to a particular instance of noncompliance if he finds that such instance of noncompliance is de minimis in nature and in duration.

*Regulations*

(b) Regulations under subsection (a) of this section shall—

(1) permit the assessment and collection of such penalty by the State if the State has a delegation of authority in effect under subsection (a)(1)(B)(i) of this section;

(2) provide for the assessment and collection of such penalty by the Administrator, if—

(A) the State does not have a delegation of authority in effect under subsection (a)(1)(B)(i) of this section, or

(B) the State has such a delegation in effect but fails with respect to any particular person or source to assess or collect the penalty in accordance with the requirements of this section;

(3) require the States, or in the event the States fail to do so, the Administrator, to give a brief but reasonably specific notice of noncompliance under this section to each person referred to in subsection (a)(2)(A) of this section with respect to each source owned or operated by such person which is not in compliance as provided in such subsection, not later than July 1, 1979, or thirty days after the discovery of such noncompliance, whichever is later;



(4) require each person to whom notice is given under paragraph (3) to—

(A) calculate the amount of the penalty owed (determined in accordance with subsection (d)(2) of this section) and the schedule of payments (determined in accordance with subsection (d)(3) of this section) for each such source and, within forty-five days after the issuance of such notice or after the denial of a petition under subparagraph (B), to submit that calculation and proposed schedule, together with the information necessary for an independent verification thereof, to the State and to the Administrator, or

(B) submit a petition, within forty-five days after the issuance of such notice, challenging such notice of noncompliance or alleging entitlement to an exemption under subsection (a)(2)(B) of this section with respect to a particular source;

(5) require the Administrator to provide a hearing on the record (within the meaning of subchapter II of chapter 5 of Title 5) and to make a decision on such petition (including findings of fact and conclusions of law) not later than ninety days after the receipt of any petition under paragraph (4)(B), unless the State agrees to provide a hearing which is substantially similar to such a hearing on the record and to make a decision on such petition (including such findings and consions) within such ninety-day period;

(6)(A) authorize the Administrator on his own initiative to review the decision of the State under paragraph (5) and disapprove it if it is not in accordance with the requirements of this section, and (B) require the Administrator to do so not later than sixty days after receipt of a petition under this subparagraph, notice, and public hearing and a showing by such peti-

tioner that the State decision under paragraph (5) is not in accordance with the requirements of this section;

(7) require payment, in accordance with subsection (d) of this section, of the penalty by each person to whom notice of noncompliance is given under paragraph (3) with respect to each noncomplying source for which such notice is given unless there has been a final determination granting a petition under paragraph (4)(B) with respect to such source;

(8) authorize the State or the Administrator to adjust (and from time to time to readjust) the amount of the penalty assessment calculated or the payment schedule proposed by such owner or operator under paragraph (4), if the Administrator finds after notice and opportunity for a hearing on the record that the penalty or schedule does not meet the requirements of this section; and

(9) require a final adjustment of the penalty within 180 days after such source comes into compliance in accordance with subsection (d)(4) of this section.

In any case in which the State establishes a noncompliance penalty under this section, the State shall provide notice thereof to the Administrator. A noncompliance penalty established by a State under this section shall apply unless the Administrator, within ninety days after the date of receipt of notice of the State penalty assessment under this section, objects in writing to the amount of the penalty as less than would be required to comply with guidelines established by the Administrator. If the Administrator objects, he shall immediately establish a substitute noncompliance penalty applicable to such source.



*Contract to assist in determining amount of penalty assessment or payment schedule*

(c) If the owner or operator of any stationary source to whom a notice is issued under subsection (b)(3) of this section—

(1) does not submit a timely petition under subsection (b)(4)(B) of this section, or

(2) submits a petition under subsection (b)(4)(B) of this section which is denied, and

fails to submit a calculation of the penalty assessment, a schedule for payment, and the information necessary for independent verification thereof, the State (or the Administrator, as the case may be) may enter into a contract with any person who has no financial interest in the owner or operator of the source (or in any person controlling, controlled by or under common control with such source) to assist in determining the amount of the penalty assessment or payment schedule with respect to such source. The cost of carrying out such contract may be added to the penalty to be assessed against the owner or operator of such source.

*Payment*

(d)(1) All penalties assessed by the Administrator under this section shall be paid to the United States Treasury. All penalties assessed by the State under this section shall be paid to such State.

(2) The amount of the penalty which shall be assessed and collected with respect to any source under this section shall be equal to—

(A) the amount determined in accordance with regulations promulgated by the Administrator under subsection (a) of this section, which is no less than the economic value which a delay in compliance beyond July 1, 1979, may have for the owner of such source,

including the quarterly equivalent of the capital costs of compliance and debt service over a normal amortization period, not to exceed ten years, operation and maintenance costs foregone as a result of noncompliance, and any additional economic value, which such a delay may have for the owner or operator of such source minus

(B) the amount of any expenditure made by the owner or operator of that source during any such quarter for the purpose of bringing that source into, and maintaining compliance with, such requirement, to the extent that such expenditures have not been taken into account in the calculation of the penalty under subparagraph (A).

To the extent that any expenditure under subparagraph (B) made during any quarter is not subtracted for such quarter from the costs under subparagraph (A), such expenditure may be subtracted for any subsequent quarter from such costs. In no event shall the amount paid be less than the quarterly payment minus the amount attributed to actual cost of construction.

(3)(A) The assessed penalty required under this section shall be paid in quarterly installments for the period of covered noncompliance. All quarterly payments (determined without regard to any adjustment or any subtraction under paragraph (2)(B) after the first payment shall be equal.

(B) The first payment shall be due on the date six months after the date of issuance of the notice of noncompliance under subsection (b)(3) of this section with respect to any source or on January 1, 1980, whichever is later. Such first payment shall be in the amount of the quarterly installment for the upcoming quarter, plus the amount owed for any preceding period within the period of covered noncompliance for such source.



(C) For the purpose of this section, the term "period of covered noncompliance" means the period which begins—

(i) two years after August 7, 1977, in the case of a source for which notice of noncompliance under subsection (b)(3) of this section is issued on or before the date two years after August 7, 1977, or

(ii) on the date of issuance of the notice of noncompliance under section (b)(3) of this section, in the case of a source for which such notice is issued after July 1, 1979,

and ending on the date on which such source comes into (or for the purpose of establishing the schedule of payments, is estimated to come into) compliance with such requirement.

(4) Upon making a determination that a source with respect to which a penalty has been paid under this section is in compliance and is maintaining compliance with the applicable requirement, the State (or the Administrator as the case may be) shall review the actual expenditures made by the owner or operator of such source for the purpose of attaining and maintaining compliance, and shall within 180 days after such source comes into compliance—

(A) provide reimbursement with interest (to be paid by the State or Secretary of the Treasury, as the case may be) at appropriate prevailing rates (as determined by the Secretary of the Treasury) for any overpayment by such person, or

(B) assess and collect an additional payment with interest at appropriate prevailing rates (as determined by the Secretary of the Treasury) for any underpayment by such person.

(5) Any person who fails to pay the amount of any penalty with respect to any source under this section on a timely basis shall be required to pay in addition a quarterly nonpayment penalty for each quarter during which such failure

to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties with respect to such source which are unpaid as of the beginning of such quarter.

*Judicial review*

(e) Any action pursuant to this section, including any objection of the Administrator under the last sentence of subsection (b), of this section shall be considered a final action for purposes of judicial review of any penalty under section 7607 of this title.

*Other orders, payments, sanctions, or requirements*

(f) Any orders, payments, sanctions, or other requirements under this section shall be in addition to any other permits, orders, payments, sanctions, or other requirements established under this chapter, and shall in no way affect any civil or criminal enforcement proceedings brought under any provision of this chapter or State or local law.

*More stringent emission limitations or other requirements.*

(g) In the case of any emission limitation or other requirement approved or promulgated by the Administrator under this chapter after August 7, 1977, which is more stringent than the emission limitation or requirement for the source in effect prior to such approval or promulgation, if any, or where there was no emission limitation or requirement approved or promulgated before August 7, 1977, the date for imposition of the non-compliance penalty under this section, shall be either July 1, 1979, or the date on which the source is required to be in full compliance with such emission limitation or requirement, whichever is later, but in no event later than three years after the approval or promulgation of such emission limitation or requirement.



**§ 7604. Citizen suits**

*Authority to bring civil action; jurisdiction*

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against—any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

*Notice*

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator,

(ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

*Venue; intervention by Administrator*

(c)(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

*Award of costs; security*

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court



determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

*Non-restriction of other rights*

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

*Definition*

(f) For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), any condition or requirement of section 7413(d) of this title (relating to certain enforcement orders), section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under part B of subchapter I of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise).

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

**§ 7607. Administrative proceedings and judicial review**

*Administrative subpenas; confidentiality; witness*

(a)(1) In connection with any determination under section 7410(f) of this title or section 7521(b)(5) of this title, or for purposes of obtaining information under section 7521(b)(4) or 7545(c)(3) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for



emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

*Judicial review*

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)

(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall



not be subject to judicial review in civil or criminal proceedings for enforcement.

*Additional evidence*

(c) In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

*Rulemaking*

(d)(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410 (c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title,

(D) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(E) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(F) promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders),

(G) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(H) promulgation or revision of regulations under subtitle B of subchapter I of this chapter (relating to stratosphere and ozone protection),

(I) promulgation or revision of regulations under subtitle C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(J) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521 (a)(3) of this title,

(K) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(L) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and conpliance by vehicles in actual use),



(M) action of the Administrator under section 7426 of title (relating to interstate pollution abatement), and

(N) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5 of the United States Code.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5 United States Code, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this subparagraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for



any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.



(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

*Other methods of judicial review not authorized*

(e) Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

*Costs*

(f) In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

*Stay, injunction, or similar relief in proceedings relating to noncompliance penalties*

(g) In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

## APPENDIX K

**Pertinent Provisions of the Ohio Revised Code, Chapters 119, 3704, 3745 and 4905, *Pages Ohio Revised Code.***

**119.11 Appeal From Orders Affecting Rules: Procedure: Transcript: Hearing: Order**

Any person adversely affected by an order of an agency in adopting, amending, or rescinding a rule or in adopting, readopting, or continuing a rule, amendment, or rescission previously adopted as an emergency rule as provided in section 119.03 of the Revised Code, may appeal to the court of common pleas of Franklin county on the ground that said agency failed to comply with the law in adopting, amending, rescinding, publishing, or distributing said rule, or that the rule as adopted or amended by the agency is unreasonable or unlawful, or that the rescission of the rule was unreasonable or unlawful. No emergency rule, amendment, or rescission adopted as provided in division (F) of section 119.03 of the Revised Code shall be subject to an appeal during the effective period of the emergency rule, amendment or rescission.

Any person desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. Such notice of appeal shall be filed within fifteen days after the order of said agency and prior to the effective date of such rule, amendment, or order of rescission and such notice shall operate as a stay of the effective date thereof unless the appeal has been heard and determined prior to such effective date. A copy of said notice of appeal forthwith shall be filed by the appellant with the court.

Within ten days after a notice of appeal is filed, the agency shall transmit to the clerk of the court of common pleas of Franklin county a transcript of its record of proceedings relating to said rule. Within three days after receiving the transcript of the record the court shall set the date, time, and place for a hearing and immediately notify the appellant and the agency thereof. Such hearing shall be held within twenty days after receiving the transcript of the record, and the decision of the court shall be rendered

within thirty days after the conclusion of said hearing and shall be based upon the arguments, briefs of counsel, and the transcript of the record of proceedings as transmitted by the agency.

If the court decides that the procedural requirements in adopting, amending, or rescinding a rule have been complied with by the agency and that the rule as adopted or amended by the agency is reasonable and lawful, or that the rescission of the rule was reasonable and lawful it shall affirm the order of the agency. If the court decides that the procedural requirements in adopting, amending, or rescinding a rule have not been complied with by the agency, or that the rule as adopted or amended by the agency is unreasonable or unlawful, or that the rescission of the rule was unreasonable or unlawful, it shall declare invalid such order by said agency.

Any order of the court in reviewing on appeal an order of any agency in adopting, amending, or rescinding a rule shall be final unless an appeal is taken therefrom, but no person affected thereby shall be precluded from attacking at any time the reasonableness or legality of any rule in its application to a particular set of facts or circumstances.

**§ 3704.03 Powers of director of environmental protection.**

The director of environmental protection may:

(A) Develop programs for the prevention, control, and abatement of air pollution;

(B) Advise, consult, contract, and cooperate with any governmental or private agency in the furtherance of the purposes of sections 3704.01 to 3704.11 of the Revised Code;

(C) Encourage, participate in, or conduct studies, investigations, and research, relating to air pollution, collect and disseminate information, and conduct education and training programs relating to the causes, prevention, control, and abatement of air pollution;



(D) Adopt, modify, and repeal regulations for the prevention, control, and abatement of air pollution from all sources throughout the state, prescribing ambient air quality standards for the state as a whole or for various areas of the state. In adopting, modifying, or repealing such regulations the director shall hear and give consideration to evidence relating to:

(1) The character and degree of any injury to human health or welfare, plant or animal life, or property or any unreasonable interference with the comfortable enjoyment of life or property as the result of air pollution;

(2) Conditions calculated to result from compliance with such standards and their relation to benefits to the people of the state to be derived from such compliance;

(3) The quantity and characteristics of air contaminants and the frequency and duration of their prescence in the ambient air;

(4) Topography, prevailing wind directions and velocities, physical conditions, and other factors which may or may combine to affect air pollution.

(E) Adopt, modify, and repeal regulations for the prevention, control, and abatement of air pollution, prescribing for the state as a whole or for various areas of the state emission standards for air contaminants, and other necessary regulations for the purposes of achieving and maintaining compliance with ambient air quality standards. In adopting, modifying, or repealing such regulations the director shall hear and give consideration to evidence relating to:

(1) Conditions calculated to result from compliance with such regulations and their relation to benefits to the people of the state to be derived from such compliance;

(2) The quantity and characteristics of air contaminants, the frequency and duration of their presence in the ambient air, and the dispersion and dilution of such contaminants;

(3) Topography, prevailing wind directions and velocities, physical conditions, and other factors which may combine to affect air pollution.

(F) Adopt, modify, and repeal regulations for the purpose of attaining and maintaining ambient air quality standards, prohibiting the location, installation, construction, or modification of any machine, equipment, device, apparatus, or physical facility which the director finds may cause or contribute to air pollution, or which is intended primarily to prevent or control the emission of air contaminants, unless an installation permit therefor has been obtained from the director or his authorized representative. Applications for installation permits shall be accompanied by plans, specifications, construction schedules, and such other pertinent information and data as the director may require. Installation permits shall be issued for a period specified by the director and are transferable. The director shall specify in such permits that the permit is conditioned upon the right of his authorized representatives to enter upon the premises of the person to whom the permit has been issued, at any reasonable time and subject to safety requirements of the person in control of the premises, for the purpose of determining compliance with this chapter, the rules adopted thereunder, and the conditions of any permit, variance, or order issued thereunder. The regulations shall require the director to issue or deny an installation permit within six months of the date upon which the director receives a complete application with all plans, specifications, schedules, and other pertinent information and data required by the director. No application shall be denied or permit revoked or modified without a written order stating the findings upon which denial, revocation, or modification is based. A copy of the order shall be sent to the applicant or permit holder by certified mail.



(G) Adopt, modify, and repeal regulations for the purpose of attaining and maintaining ambient air quality standards, prohibiting the operation or other use of any new, modified, or existing machine, equipment, device, apparatus, or physical facility which the director finds may cause or contribute to air pollution, unless an operating permit has been obtained from the director or his authorized representative, or such facility is being operated in compliance with the conditions of a variance. Applications for operating permits shall be accompanied by such plans, specifications, and other pertinent information as the director may require. Operating permits may be issued for a period determined by the director not to exceed three years, are renewable, and are transferable. The director shall specify in such permits that the permit is conditioned upon the right of his authorized representatives to enter upon the premises of the person to whom the permit has been issued, at any reasonable time and subject to safety requirements of the person in control of the premises for the purpose of determining compliance with this chapter, the rules adopted thereunder, and the conditions of any permit, variance, or order issued thereunder. Operating permits may be denied or revoked for failure to comply with Chapter 3704. of the Revised Code or the regulations adopted thereunder. The regulations shall require the issuance of an operating permit upon a showing satisfactory to the director or his representative, that the machine, equipment, device, apparatus, or physical facility is being operated in compliance with applicable emission standards and other regulations. The regulations shall provide for the issuance of conditional operating permits for such reasonable periods as the director may determine, to allow the holder of an installation permit to make adjustments or modifications necessary to enable any new or modified machine, equipment, device, apparatus, or physical facility to comply with applicable emission standards and other regulations. No application shall be denied or permit revoked or modified without a

written order stating the findings upon which denial revocation, or modification is based. A copy of the order shall be sent to the applicant or permit holder by certified mail.

(H) Issue, revoke, modify, or deny variances from his regulations, including variances for emissions in excess of the applicable emission standards. In issuing, revoking, modifying, or denying such variances the director shall hear and give consideration to evidence that:

(1) Compliance with such standards and other regulations is impractical because of conditions beyond the control of the applicant.

(2) Compliance with such standards and other regulations would be technically infeasible or economically unreasonable.

(3) The emissions of the applicant for which a variance is requested have little effect on ambient air quality and do not endanger or threaten to endanger human health, due to topography, direction and velocity of prevailing winds, height of emission source, or other factors.

(4) Compliance with the standards or other regulations from which variance is sought would produce serious hardship without equal or greater benefit to the public.

(5) The emissions of the applicant from which a variance is requested were in conformity with the emission standards in force at the time a permit was issued to the applicant under division (F) of this section.

In issuing such variances, the director may also order the person to whom the permit is issued to furnish plans and specifications and such other information and data as the director may require, and to proceed to take such action within such time as the director may determine to be appropriate and reasonable to prevent, control, or abate his existing emissions of air contaminants. The director shall specify in such variances that the variance is conditioned upon



the right of his authorized representatives to enter upon the premises of the person to whom the variance has been issued, at any reasonable time and subject to safety requirements of the person in control of the premises for the purpose of determining compliance with this chapter, the rules adopted thereunder, and the conditions of any permit, variance, or order issued thereunder.

The director may hold a public hearing on an application for a variance or renewal thereof, at a location in the county where the variance is sought. The director shall give not less than twenty days' notice of the hearing to the applicant by certified mail and cause at least one publication of notice in a newspaper with general circulation in the county where the variance is sought. The director shall keep available for public inspection at the principal office of the environmental protection agency a current schedule of pending applications of variances and a current schedule of pending variance hearings. The director shall make a complete stenographic record of testimony and other evidence submitted at the hearing. Within ten days after the hearing the director shall make a written determination to issue, renew, or deny the variance, and shall enter his determination and the basis therefor into the record of the hearing. The director shall issue, renew, or deny an application for a variance or renewal thereof within six months of the date upon which the director receives a complete application with all pertinent information and data required by the director.

No variance shall be issued, revoked, modified, or denied until the director has considered the relative interests of the applicant, other persons and property affected by the discharge, and the general public. Any variance granted pursuant to this section shall be for a period specified by the director and may be renewed from time to time on such terms and for such periods, not to exceed one year each, as the director determines to be appropriate. No application

shall be denied or variance revoked or modified without a written order stating the findings upon which denial, revocation, or modification is based. A copy of the order shall be sent to the applicant or variance holder by certified mail.

(I) Require the person responsible for any source of emission which may reasonably be considered as being a source of or contributing to air pollution to install, maintain, and operate monitoring devices, and to maintain records and file periodic reports with the director containing information as to location, size and height of emission outlets, rate, duration, and composition of emissions, and any other pertinent information the director may request. In requiring monitoring devices, records, and reports the director shall give consideration to technical feasibility and economic reasonableness, and allow reasonable time for compliance.

(J) Establish, operate, and maintain monitoring stations and other devices designed to measure air pollution and to enter into contracts with any public or private agency for the establishment, operation, or maintenance of such stations and devices;

(K) Adopt regulations prescribing a schedule of fees to be paid by applicants for and holders of permits and variances under divisions (F), (G), and (H) of this section. Such schedule of fees shall be designed to defray the costs of processing, issuing, revoking, modifying, and denying permits and variances.

(L) By resolution adopt procedures for giving reasonable public notice and conducting public hearing on any plans for the prevention, control, and abatement of air pollution that the director is required to submit to the federal government;

(M) Through any employee, agent, or authorized representative of the director or the environmental protection



agency, enter upon private or public property, including improvements thereon, at any reasonable time for the purpose of making inspections, conducting tests, and examining records or reports pertaining to any emission of air contaminants and of determining if there are any actual or potential emissions from such premises, and if so, to determine the sources, amounts, contents, and extent of such emissions, or to ascertain compliance with sections 3704.01 to 3704.11 of the Revised Code, any orders or regulation adopted thereunder, or any other determination of the director. If entry or inspection authorized by this division is refused, hindered, or thwarted, the director or his authorized representative may by affidavit apply for, and any judge of a court of record may issue, an appropriate inspection warrant necessary to achieve the purposes of this chapter within the court's territorial jurisdiction.

(N) Accept and administer gifts or grants from the federal government and from any other source, public or private, for carrying out any of its functions;

(O) Obtain necessary scientific, technical, and laboratory services;

(P) Establish advisory boards in accordance with section 121.13 of the Revised Code;

(Q) Delegate to any city or general health district or political subdivision of the state any of his enforcement and monitoring powers and duties, other than regulation making powers, as the director elects to delegate, and in addition employ, compensate, and prescribe the powers and duties of such officers, employeers, and consultants as are necessary to enable the director to exercise his authority and perform duties imposed upon him by law. Technical and other service shall be performed, insofar as practical, by personnel of the environmental protection agency.

(R) Certify to the government of the United States or any agency thereof that an industrial air pollution facility

is in conformity with the state program or requirements for control of air pollution whenever such certificate is required for a taxpayer pursuant to any federal law or requirements;

(S) Issue, modify, or revoke orders prohibiting or abating emissions which violate applicable emission standards, or requiring emission control devices or measures in order to comply with applicable emission standards. In the making of such orders the director shall give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of compliance with such orders, and their relation to benefits to the people of the state to be derived from such compliance.

(T) Exercise all incidental powers required to carry out sections 3704.01 to 3704.11 of the Revised Code.

The environmental protection agency shall develop a plan to control air pollution resulting from state-operated facilities and property.

**§ 3704.05 Prohibitions.**

(A) No person shall cause, permit, or allow emission of an air contaminant in violation of any regulation adopted by the director of environmental protection under division (E) of section 3704.03 of the Revised Code, unless such person is the holder of a variance issued under division (H) of section 3704.03 of the Revised Code, permitting the emission of such contaminant in excess of that permitted by such regulation.

(B) No person who is the holder of a variance issued under division (H) of section 3704.03 of the Revised Code shall cause, permit, or allow emission of an air contaminant or contaminants listed therein in violation of the conditions of such variance or fail to obey an order of the director issued under authority of such division.



(C) No person who is the holder of a permit issued under division (F) or (G) of section 3704.03 of the Revised Code shall violate any of the terms or conditions of such permit.

(D) No person shall fail to install and maintain monitoring devices or to submit reports or other information as may be required under division (I) of section 3704.03 of the Revised Code.

(E) No person to whom a permit or variance has been issued shall refuse entry to an authorized representative of the director or the environmental protection agency as provided in division (M) of section 3704.03 of the Revised Code, or hinder or thwart such person in making such investigation.

(F) No person shall fail to submit plans and specifications as required by section 3704.03 of the Revised Code.

(G) No person shall violate Chapter 3704, of the Revised Code, or any order, regulation, or determination of the director thereunder.

(H) No person shall knowingly falsify any plans, specifications, data, reports, records, or other information required to be kept or submitted to the director by Chapter 3704. of the Revised Code or the regulations adopted thereunder.

**§ 3745.04 Appeals to environmental board of review.**

As used in this section, "any person" means any individual, any partnership, corporation, association, or other legal entity, or any political subdivision, instrumentality, or agency of a state, whether or not the individual or legal entity is an applicant for or holder of a license, permit, or variance from the environmental protection agency.

As used in this section, "action" or "act" includes the adoption, modification, or repeal of a regulation or stand-

ard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or regulation thereunder.

Any person who was a party to a proceeding before the director may participate in an appeal to the environmental board of review for an order vacating or modifying the action of the director of environmental protection or local board of health, or ordering the director or board of health to perform an act. The environmental board of review has exclusive original jurisdiction over any matter which may, under this section, be brought before it.

The person so appealing to the board shall be known as appellant, and the director and any party to a proceeding substantially supporting the finding from which the appeal is taken shall be known as appellee, except that when an appeal involves a license to operate a disposal site or facility, the local board of health or the director of environmental protection, and any party to a proceeding substantially supporting the finding from which the appeal is taken, shall, as appropriate, be known as the appellee. Appellant and appellee shall be deemed to be parties to the appeal.

The appeal shall be in writing and shall set forth the action complained of and the grounds upon which the appeal is based.

The appeal shall be filed with the board within thirty days after notice of the action. Notice of the filing of the appeal shall be filed with the appellee within three days after the appeal is filed with the board.

Within seven days after receipt of the notice of appeal the director or local board of health shall prepare and certify to the board a record of the proceedings out of which



the appeal arises, including all documents and correspondence, and a transcript of all testimony.

Upon the filing of the appeal, the board shall fix the time and place at which the hearing on the appeal will be held. The board shall give appellant and the appellee at least ten days' written notice thereof by certified mail. The board shall hold the hearing within thirty days after the notice of appeal is filed. The board may postpone or continue any hearing upon its own motion or upon application of appellant or of the appellee.

The filing of an appeal does not automatically suspend or stay execution of the action appealed from. Upon application by the appellant the board may suspend or stay such execution pending immediate determination of the appeal without interruption by continuances, other than for unavoidable circumstances.

**§ 3745.05 Hearings before environmental board of review.**

In hearing the appeal, if an adjudication hearing was conducted by the director of environmental protection in accordance with sections 119.09 and 119.10 of the Revised Code, the board is confined to the record as certified to it by the director. The board may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the director. If no adjudication hearing was conducted in accordance with sections 119.09 and 119.10 of the Revised Code, the board shall conduct a hearing de novo on the appeal.

For the purpose of conducting a de novo hearing, or where the board has granted a request for the admission of additional evidence, the environmental board of review may require the attendance of witnesses and the production of written or printed materials.

When conducting a de novo hearing, or when a request for the admission of additional evidence has been granted, the board may, and at the request of any party it shall, issue subpoenas for witnesses or for books, papers, correspondence, memoranda, agreements, or other documents or records relevant or material to the inquiry directed to the sheriff of the counties where the witnesses or documents or records are found, which subpoenas shall be served and returned in the same manner as those allowed by the court of common please in criminal cases.

The fees and mileage of sheriffs and witnesses shall be the same as those allowed by the court of common pleas in criminal cases. The fee and mileage expenses incurred at the request of the appellant shall be paid in advance by the appellant, and the remainder of the expenses shall be paid out of funds appropriated for the expenses of the board.

In case of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, the court of common pleas of the county in which the disobedience, neglect, or refusal occurs, or any judge thereof, on application of the board or any member thereof, may compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify therein.

A witness at any hearing shall testify under oath or affirmation, which any member of the board may administer. A witness, if he requests, shall be permitted to be accompanied, represented, and advised by an attorney, whose participation in the hearing shall be limited to the protection of the rights of the witness, and who may not examine or cross-examine witnesses. A witness shall be advised of his right to counsel before he is interrogated.



A stenogaphic record of the testimony and other evidence submitted shall be taken by an official court shorthand reporter. The record shall include all of the testimony and other evidence and the rulings on the admissibility thereof presented at the hearing. The board shall pass upon the admissibility of evidence, but any party may at the time object to the admission of any evidence and except to the rulings of the board thereon, and if the board refuses to admit evidence the party offering same may make a proffer thereof, and such proffer shall be made a part of the record of such hearing.

If, upon completion of the hearing, the board finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, if the board finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from. Every order made by the board shall contain a written finding by the board of the facts upon which the order is based. Notice of the making of the order shall be given forthwith to each party to the appeal by mailing a certified copy thereof to each party by certified mail, with a statement of the time and method by which an appeal may be perfected.

The order of the board is final unless vacated or modified upon judicial review.

### § 3745.06 Appeals to courts of appeals.

Any party adversely affected by an order of the environmental board of review may appeal to the court of appeals of Franklin county, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the board a notice of appeal designating the order appealed from. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified

mail to the director of environmental protection. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the board by certified mail of the making of the order appealed from. No appeal bond shall be required to make an appeal effective.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of the board. If it appears to the court that an unjust hardship to the appellant will result from the execution of the board's order pending determination of the appeal, the court may grant a suspension of the order and fix its terms.

Within twenty days after receipt of the notice of appeal, the board shall prepare and file in the court the complete record of proceedings out of which the appeal arises, including any transcript of the testimony and any other evidence which has been submitted before the board. The expense of preparing and transcribing the record shall be taxed as a part of the costs of the appeal. The appellant, other than the state or a political subdivision, or an agency of either, or any officer thereof acting in his representative capacity, shall provide security for costs satisfactory to the court. Upon demand by a party the board shall furnish at the cost of the party requesting the same a copy of such record. In the event the complete record is not filed within the time provided for in this section, any party may apply to the court to have the case docketed, and the court shall order such record filed.

In hearing the appeal, the court is confined to the record as certified to it by the board. The court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the board.



The court shall conduct a hearing on the appeal and shall give preference to all proceedings under this section over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. The hearing in the court of appeals shall proceed as in the case of a civil actions, and the court shall determine the rights of the parties in accordance with the laws applicable to such action. At the hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.

The court shall affirm the order complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. When the court finds an ambient air quality standard, an emission standard, or a water quality or discharge standard to be deficient, it shall order the director of environmental protection to modify the standard to comply with the laws governing air or water pollution. The court shall retain jurisdiction until it approves the modified standard. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. Such appeals may be taken by any party to the appeal and shall proceed as provided in Chapter 2505. of the Revised Code.

**§ 4905.22 Service and facilities required; unreasonable charge prohibited. (GC §§ 614-12, 614-13)**

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumen-

talities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

## APPENDIX L

**Pertinent Ohio Environmental Regulations.**

**Ohio Administrative Code § 3745-17-02**

*EP-11-02 (AP-3-02) Ambient air quality standards.*

(A) Ambient air quality standards for suspended particulates, to be applicable throughout the area, shall be as follows:

(1) The maximum annual geometric mean concentration shall not exceed sixty (60) micrograms per cubic meter.

(2) The maximum twenty-four (24) hour concentration not to be exceeded more than once per year shall be one hundred and fifty (150) micrograms per cubic meter.

(B) Ambient air quality standards for sulfur dioxide applicable throughout the area shall be as follows:

(1) The maximum annual arithmetic mean concentration shall not exceed sixty (60) micrograms per cubic meter (0.02 parts per million by volume).

(2) The maximum twenty-four (24) hour concentration not to be exceeded more than once per year shall be two hundred and sixty (260) micrograms per cubic meter (0.10 parts per million by volume).

(Adopted January 28, 1972; effective February 15, 1972.)

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**Ohio Administrative Code § 3745-17-10**

*EP-11-10 (AP-3-11) Restriction on emission of particulate matter from fuel burning equipment.*

(A) General provisions.

(1) This regulation applies to installations in which fuel is burned for the primary purpose of producing heat or power by indirect heat transfer. Fuels include those such as coal, coke, lignite, coke breeze, fuel oil,

natural gas, process gas, and wood, but do not include refuse. When any products or by-products of a manufacturing process are burned for the same purpose or in conjunction with any fuel, the same maximum emission limitations shall apply.

(2) The heat content of coal shall be determined according to ASTM method D-271-68 Laboratory Sampling and Analysis of Coal or Coke or ASTM method D-2015-66 Gross Calorific Value of Solid Fuel by the Adiabatic Bomb Calorimeter, which publications are made a part of this section by reference.

(3) For purposes of this regulation the heat input shall be the aggregate heat content of all fuels whose products of combustion emanate from a single fuel burning unit. The heat input value used shall be the equipment manufacturer's or designer's guaranteed maximum input, whichever is greater. The total heat input of all fuel burning units on a plant or premises which are united either physically or operationally, shall be used for determining the maximum allowable amount of particulate matter which may be emitted from any single fuel burning unit.

(4) The amount of particulate matter emitted shall be measured according to the American Society of Mechanical Engineer's Power Test Codes—PTC-27 dated 1957 and entitled "Determining Dust Concentrations in a Gas Stream", which publication is made a part of this section by reference.

(B) Emission limitations.

(1) No person shall cause, suffer, allow or permit the emission of particulate matter, caused by combustion of fuel in fuel-burning equipment from any stack or chimney in excess of the quantity set forth in the following Figure 1. [following AP-3].



(2) All persons located within air quality control regions classified as Priority I Regions shall attain or exceed that degree of emission reduction specified by Curve P-1 by the effective date of this regulation.

(3) All persons located within air quality control regions classified as Priority II and III Regions shall attain or exceed that degree of emission reduction specified by Curve P-2 by the effective date of this regulation.

(4) All persons located within air quality control regions classified as Priority II and III Regions shall attain or exceed, no later than July 1, 1975, that degree of emission reduction specified by Curve P-1.

(Adopted July 6, 1972; effective July 17, 1972.)

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**Ohio Administrative Code § 3745-17-13**

*EP-11-13 (AP-3-14) Restrictions on emission of sulfur dioxide from use of fuel.*

(A) General Provisions.

(1) This regulation shall apply to any installation in which fuel is burned and in which the sulfur dioxide emission is largely due to the sulfur content of the fuel burned, and in which the fuel is burned primarily to produce heat or power by indirect heat transfer.

(2) For purposes of the regulation, a fuel burning installation is any single fuel-burning furnace or boiler or other unit, device, or contrivance in which fuel is burned or any grouping of two or more such furnaces or boilers or other units, devices, or contrivances which are united either physically or operationally or otherwise located in close proximity to each other and under control of the same person. The capacity of such instal-

lation shall be the manufacturer's or designer's guaranteed maximum heat input rate.

(3) The method of measuring sulfur oxides in stack gases shall be the Shell Development Company method as published in "Atmospheric Emissions from Sulfuric Acid Manufacturing Processes", Public Health Service Publication 999-AP-13 Appendix B, 85-7 which publication is made a part of this regulation by reference. The method for determining the percent of sulfur in coal shall be that described in ASTM D-271-68, Standard Methods of Laboratory Sampling and Analysis of Coal and Coke or equvalent method approved by the Board. The method for determining the heat content of coal shall be that described in ASTM D-271-68, Standard Methods of Laboratory Sampling and Analysis of Coal and Coke or D-2015-66, Tentative Method of Test for Gross Calorific Value of Solid Fuel by the Adiabatic Bomb Calorimeter. All coal analyses and heat contents are to be made on a dry basis. Moisture content of coal is to be determined in all cases and results reduced to facilitate calculations of actual pollutants. The method for determining the sulfur content of fuel oil shall be that described in ASTM D-129-64 Standard Method of Test for Sulfur in Petroleum Products by the Bomb Method. The method for determining the heat content of fuel oil shall be that described in ASTM D-240-64 Standard Method of Test for Heat of Combustion of Liquids by Bomb Calorimeter or other method giving comparable results. The testing methods specified in the subsection (A) (3) are hereby made a part of this regulation by preference.

(4) The Board is authorized to take samples of any fuel by any appropriate means and at any reasonable time or place, for purposes of determining compliance with this regulation where applicable, the following method will be used.



For coal: ASTM: D-492-48 (1958), Standard Method of Sampling Coals Classified According to Ash Content

ASTM: D-2013-68, Tentative Method of Preparing Coal Samples for Analysis

ASTM: D-2234-68, Tentative Method for Mechanical Sampling of Coal

For oil: ASTM: D-270-65, Standard Method of Sampling Petroleum and Petroleum Products

(5) Upon request of the Board, the operator of any existing sources of emission of sulfur dioxide resulting from the burning of fuel shall provide a sulfur analysis of the fuel used.

(6) If a fuel is used as an essential raw material in a manufacturing operation and its heat value is an incidental part of the operation, the restrictions of regulation AP-3-14 shall not apply and the source shall be controlled under the provisions of the regulation AP-3-13 and such other restrictions as the Board may impose to assure that the air quality standards will be met.

(7) Nothing in this regulation shall be interpreted to preclude research or experimentation into alternate methods of meeting the intent and restrictions of this regulation.

(B) Emission limitations.

(1) No person shall cause, suffer, allow, or permit the emission of sulfur compounds caused by the combustion of fuel in fuel-burning equipment from any stack or chimney in excess of the quantity set forth in Figure III.

(2) All persons located within air control regions classified as Priority I Regions shall attain or exceed that degree of emission reduction specified by Curve P-1 by the effective date of this regulation.

(3) All persons located within air quality control regions classified as Priority II Regions shall attain or exceed that degree of emission reduction specified by Curve P-2 by the effective date of this regulation.

(4) All persons within air quality control regions classified as Priority III Regions shall attain or exceed that degree of emission reduction specified by Curve P-3 by the effective date of this regulation.

(5) All persons located within air quality control regions classified as Priority II or III Regions shall attain or exceed, no later than July 1, 1975, that degree of emission reduction specified by Curve P-1.

(Adopted July 6, 1972; effective July 17, 1972.)

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**Ohio Administrative Code § 3745-35-03**

*EP-32-03 Variances*

(A) General Rule. No person shall cause, permit, or allow the operation or other use of any air contaminant source that emits any air pollutant in violation of any applicable law, unless a variance including an approved compliance schedule has been applied for and obtained from the Director for such source, pursuant to the provisions of this rule.

(B) Applications for Variance.

(1) Applications for variances shall be signed by the corporate President, Vice President reporting directly to the President, or highest ranking corporate officer with offices located in the state; or by an equivalently responsible officer in the case of organizations other than corporations; or, in other cases, by the source owner or operator; or, in the case of political subdivision, the highest elected official of such subdivision. Such signature shall constitute affirmation that the statements made in the application are true and complete, and shall subject the responsible official to liability under state laws forbidding false or misleading statements. By his signature, the responsible officer shall assume responsibility for operating and maintaining the source and control equipment in a manner designed to assure compliance with applicable law and the terms and conditions of any variance issued to such source.



(2) Applications for variances shall be submitted to the Ohio EPA within six months of the effective date of these regulations for existing air contaminant sources not in compliance with applicable law on that date. Failure to file a timely application shall be cause for the Director to issue an order immediately prohibiting all emissions from the source.

(3) Applications for variances shall be made in a form and manner prescribed by the Ohio EPA.

(4) A separate application for a variance shall be made for each air contaminant source to which this rule, EP-32-03, applies.

(5) Any variance application that fails to contain a compliance schedule or that, on its face, fails to provide the Ohio EPA with requested information needed to provide a factual basis for ascertaining compliance with each of the requirements of EP-32-03 (C) (1) may be considered defective and be treated as if it had

not been filed. No hearing need be granted with respect to such improper applications, which shall be returned to the applicant without further processing with an indication of the deficiency.

(C) Standards for Granting Variances.

(1) No variance to operate an air contaminant source shall be granted unless:

(a) Such source is not a new source; and

(b) There is an approvable compliance schedule for such source. A compliance schedule shall be approvable where it shows to satisfaction of the Director that:

(i) The plan and schedule provide for the earliest possible compliance by the source; and,

(ii) Any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on the public health; and,

(iii) Good faith efforts have been and will be made to reduce emissions, or otherwise comply with any state or local laws, ordinances, or regulations; and,

(iv) The proposed control strategy will bring the source into compliance with applicable laws, rules and regulations; and,

(v) The continued operation of the source does not endanger or threaten to endanger human health; and,

(vi) The compliance schedule contains a date on or before which the source shall be



operated in compliance with applicable law, rules and regulations.

(2) Except as provided in Section 3704.12 of the Ohio Revised Code, no variance shall be granted from the provision of Rule AP-3-08 governing open burning.

(D) Action on Applications for Variances.

(1) Prior to taking any action on an application for a variance, the Ohio EPA may hold a public meeting on the proposed compliance schedule in the manner specified in the Rules of Procedure of the Ohio EPA, Chapter EP-40.

(2) In granting, revoking, denying, or modifying any variance, the Director shall state his reasons therefor in writing. The decision and reasons therefor shall be made publicly available at the cost of reproduction and handling.

(3) The Director shall act on an application for a variance within six months of filing a complete application.

(4) Variances under this rule shall be issued or denied and may be challenged in accordance with the provisions of the Rules of Procedure of the Ohio EPA, Chapter EP-40.

(E) Interim Reporting. In addition to the other registration and reporting requirements of all air contaminant sources, the holder of a variance shall file reports every two months or as required by the Ohio EPA which shall be signed by the applicant for the variance. These reports shall demonstrate, to the satisfaction of the Director that the source for which the variance was issued is making consistent progress and has met all interim deadlines specified in the compliance schedule or specified by the Ohio

EPA. If the responsible official fails to file an interim report, or if such report fails to satisfy the Director that the source is making satisfactory progress, then he shall revoke the variance. The variance holder shall assume full personal responsibility for the completeness and accuracy of statements made in the interim report. False or misleading statements in an interim report shall be grounds for revocation of the variance, and shall subject the variance holder to the sanctions available under state laws.

(F) Terms and Conditions.

(1) An approved compliance schedule shall be incorporated into any variance granted, and shall be a term and condition thereof.

(2) Variances shall be effective for whatever period the Director deems appropriate, not to exceed one year. A variance may be renewed only when the Ohio EPA is satisfied that the source for which the variance was granted is making satisfactory progress toward achievement of the program specified in its compliance schedule. No variance to operate an air contaminant source in an air quality control region designated as Priority I, II or III, in violation of an emission standard applicable to such region and source, shall be effective after April 15, 1977, except as provided in the following sentence. No variance to operate an air contaminant source in an air quality control region designated as Priority II or Priority III in violation of AP-3-11(B)(4) or AP-3-12(B)(5) or AP-3-14(B)(5) shall be effective after July 1, 1978.

(3) The possession of a variance to operate in excess of any emission standard, limitation, or regulation of the Ohio EPA shall not relieve the holder of responsibility to comply with all other applicable law and regulations of the Ohio EPA.



(4) Any variance issued by the Director shall be subject to revision in response to changes in applicable rules and regulations or other factors affecting the compliance of the source or control facility with the standards or conditions of the original variance.

(5) The transferee of any variance shall, personally, assume the responsibilities of the original variance holder-transferor. The Ohio EPA must be notified in writing of any transfer of a variance.

(6) Such air pollution emergency episode plans as are submitted and approved shall become terms and conditions of the variance and shall have full force and effect as a part thereof.

(7) The Director may include such other terms and conditions as are necessary to ensure compliance with applicable law or to gather information about ambient air quality emissions levels, or other aspects of the source operation.

(G) Variance No Defense To Violations. Possession of a variance relieving an air contaminant source from having immediately to comply with any requirement of applicable law shall not relieve any such source of the responsibility to comply with all other requirements of applicable law.

(H) Revocation.

(1) The Director shall revoke a variance is he determines that any of the terms, conditions, standards, or requirements of Sections (C), (E), or (F) of this rule have been or will be violated.

(2) A variance that hts been revoked shall forthwith be surrendered to the Ohio EPA.

Former regulation EP-32-03 adopted June 18, 1973, effective July 5, 1973, is rescinded.

(Adopted June 20, 1975, effective July 28, 1975)

Supreme Court, U.S.
FILED
FEB 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1163

**OHIO EDISON COMPANY,**

*Petitioner,*

v.

**NED E. WILLIAMS (succeeded by James F. McAvoy), DIRECTOR OF ENVIRONMENTAL PROTECTION,**

*Respondent.*

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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*Respondent.*

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## STATEMENT OF THE CASE

### 1. Nature of the Case

This matter arose upon application by Petitioner Ohio Edison Company for variances from air pollution abatement requirements imposed by regulations of the Ohio Environmental Protection Agency. Ohio Edison appeals from the order of Respondent Director of Environmental Protection denying the applications, and refusing to permit the administrative evidentiary hearing, held to grant Ohio Edison the opportunity to demonstrate its eligibility for variances under applicable regulations, to be converted into a forum for a broad-based challenge to air contaminant emission standards. Ohio Edison now claims that the Director's refusal to ignore or invalidate his regulations in a quasi-judicial context is a violation of the Due Process Clause of the Fourteenth Amendment.

## 2. Course of Proceeding

In February, 1972, the Air Pollution Control Board promulgated regulations to remedy the pervasive problem of poor air quality in Ohio. The regulations resulted from amendment, in 1971, of Chapter 3704, Revised Code, in which the Ohio General Assembly granted the Board the authority necessary so that Ohio would "comply with the 1970 amendments of the Federal Clean Air Act," uncodified Section 4, Amended Substitute Senate Bill No. 370, 134 Laws of Ohio, page 650. The regulations established ambient air quality standards (prescribing concentrations of pollutants in the outdoor air necessary to protect public health and welfare), emission standards (applicable to each source of air contaminants), and regulations governing the issuance of permits and variances. The latter regulation unambiguously limited issuance of variances — which authorize emissions in excess of applicable emission standards — to contaminant sources which would commit to an abatement program resulting in compliance with emission standards, and prescribed dates beyond which variances would no longer issue. The regulations are now administered by the Director of Environmental Protection, and are substantially unchanged from their original promulgation over seven years ago. The variance regulation, now numbered OAC 3745-35-03 (Appendix L, p. 156a, Petition for Writ of Certiorari), has been amended to extend the deadline dates, but has never been altered so as to delete the requirements of ultimate compliance with emission standards (OAC 3745-35-03(F) (1)), and the preclusion of issuance of variances beyond a specified date (OAC 3745-35-03(F) (2)).

Ohio Edison, in August of 1972, applied for variances for air contaminant sources at twelve facilities within the State of Ohio. The applications did not, despite the clear provisions of OAC 3745-35-03, commit Ohio Edison to timely compliance with emission standards, but rather sought to challenge the air pollution regulatory code as unlawful and therefore inapplicable to Ohio Edison. The Director was requested, in effect, to respond to Ohio Edison's applications by declaring his own regulations unlawful and granting to Ohio Edison a new, lenient emission standard in an administrative order to be denominated a "variance."

The Director declined Ohio Edison's request to ignore his own regulations, but rather, in May, 1973, issued proposed variances to Ohio Edison which, as required by OAC 3745-35-03,



contained schedules by which applicable emission standards were to be attained. Ohio Edison, in June, 1973, requested adjudication hearings, thereby preventing the proposed variances from becoming final until completion of hearing proceedings. At hearing, Ohio Edison did not attempt to demonstrate its eligibility for variances under OAC 3745-35-03, but rather adduced evidence upon which the Director was requested to rule that OAC 3745-17-10, OAC 3745-17-13, and OAC 3745-35-03, in spite of their clear applicability to Ohio Edison, were to be shunted aside and variances issued containing more lenient terms acceptable to Ohio Edison. Thus, Ohio Edison persisted in its quest for a rewriting of the air pollution regulatory code.

On December 12, 1974, the Director issued his decision (Appendix G, p. 27a, Petition for Writ of Certiorari). Because he was now convinced that his sulfur dioxide emission standard regulation, OAC 3745-17-13, was more stringent than necessary to achieve the purposes of Chapter 3704, Revised Code, the Director appropriately declined to issue the variances sought by Ohio Edison, for, as required by OAC 3745-35-03(F) (1), such variances would necessarily contain a schedule within which Ohio Edison would be required to comply with such emission standard. As to emissions of particulate matter, however, the Director found no reason to further delay compliance with the emission standard regulation. He therefore issued an enforcement order pursuant to Section 3704.03(S), Revised Code, requiring that Ohio Edison's facilities comply with the particulate matter emission standard, either through installation of abatement equipment or phase out of the facility, by April 15, 1977, the date prescribed by OAC 3745-17-04 upon which the ambient air quality standards were to be attained. The Director again explicitly declined to rewrite his regulations, stating, at page 16 of his opinion (Appendix G, p. 40a, Petition for Writ of Certiorari):

> The Director is bound by law and his own regulations to base his final decision in any adjudication hearing solely on the evidence presented in the record. When deciding the outcome of an adjudication hearing, the Director can not act in a legislative (rulemaking) capacity. He must act as judge.

And, at page 20 (p. 44a, Petition for Writ of Certiorari):

> The Director is not at liberty to address the general validity of his own regulations in the context of this final findings and order. Regulations may be amended or rescinded only through the procedures established in Section 119.03 of the Ohio Revised Code.

Therefore, the quasi-judicial rulemaking sought by Ohio Edison was not forthcoming from the Director.

In January, 1975, Ohio Edison and other utility companies subject to the Director's decision and orders appealed to the Environmental Board of Review. The Board separated the utilities for purposes of deciding the appeals, and decided the appeal of the Cleveland Electric Illuminating Co. first, in October of 1976. Cleveland Electric's appeal reached this Court through filing of a Petition for Writ of Certiorari on July 27, 1978 (No. 78-152). The Petition, which presented, *inter alia*, the identical issue presented by the instant Petition, was denied on October 2, 1978.

The Board rendered its decision regarding Ohio Edison's appeal on May 20, 1977. As with the Cleveland Electric appeal, the Board affirmed the Director's refusal to engage in *de facto* rulemaking in the context of a quasi-judicial administrative hearing. The Board further affirmed the Director's order insofar as it required Ohio Edison to comply with Ohio EPA's particulate matter emission standard, but extended the time for such compliance by requiring the Director to issue variances beyond the dates provided by OAC 3745-35-03(F) (2) beyond which variances may not issue.

Both the Director and Ohio Edison appealed to the Court of Appeals for Franklin County, Ohio. The Director argued, and the court held (Appendix D, p. 7a, Petition for Writ of Certiorari), that the deadline dates and other provisions of OAC 3745-35-03 are lawful as a matter of Ohio law, and therefore reversed the Board insofar as the Board ordered issuance of variances beyond such dates. The court affirmed the Director and the Board in holding that a quasi-judicial administrative hearing presented Ohio Edison the opportunity to demonstrate its eligibility for variances under the regulatory code, but did not constitute a forum in which Ohio Edison could mount a broad-based attack upon air pollution regulations. The court held that such an attack could be made in defense to an action brought by the Director to



enforce the regulations. Because Ohio Edison was clearly ineligible for variances under the OAC 3745-35-03, the court declined to address Ohio Edison's other assignments of error, the disposition of which would not affect the judgment of the court or proceedings on remand.

Upon appeal, the Supreme Court of Ohio refused jurisdiction, noting "that no substantial constitutional question exists herein." (Appendix A, p. 1a, Petition for Writ of Certiorari).

Ohio Edison, on January 25, 1979, filed its Petition for Writ of Certiorari.

## QUESTION PRESENTED

Does the Due Process Clause require the Ohio Director of Environmental Protection, in an administrative hearing requested by an applicant for a variance from air pollution abatement requirements, to give cognizance to such applicant's broad-based challenge to such requirements, when to do so would offend settled notions of Ohio administrative law, and any variance issuing as a result of such challenge would contravene the clear terms of the lawful regulation governing issuance of such variances?

## REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

### 1. The Question Presented Here Is Identical To That Presented By Petitioner Cleveland Electric Illuminating Company In No. 78-152, Which Petition Was Denied By This Court On October 2, 1978.

This petition is the companion of an earlier petition of the Cleveland Electric Illuminating Co. in No. 78-152. The December 12, 1974, decision of Respondent Director was issued at the close of a consolidated proceeding in which both Cleveland Electric and Ohio Edison participated as parties, and from which both appealed. The Environmental Board of Review decided Cleveland Electric's appeal approximately seven months prior to deciding the Ohio Edison appeal, even although both appeals presented virtually identical issues of law. Conse-

quently, the decisions of the Ohio appellate courts, and the petitions for writ of certiorari, are separated by several months.

In every tribunal, both Cleveland Electric and Ohio Edison have argued that they should be permitted to attack applicable regulations rather than adduce evidence to demonstrate eligibility for variances under OAC 3745-35-03. Both petitions for writ of certiorari contend that the Due Process Clause requires the Director to grant the requested relief, i.e., that the narrowly-defined administrative hearing below be distorted into a virtually boundless proceeding in which nearly every air pollution issue may be litigated, see Petition for Writ of Certiorari, No. 78-152, at pages 16 through 18.

There is nothing to distinguish this petition from that in No. 78-152. Accordingly, this petition should be denied for the same reasons which support denial of the earlier petition.

**2. The Due Process Clause Does Not Require That A State Provide A Forum Within Which An Air Polluter May Mount A Pre-enforcement Challenge To Emission Standard Regulations.**

The contention of Ohio Edison is two-fold: a.) that the Due Process Clause requires a state to provide a forum for a pre-enforcement challenge to emission standards; and b.) that the Due Process Clause required Respondent Director to convert the administrative hearing below into such a forum, despite contrary provisions in a regulation held lawful under state law. Both contentions lack merit.

There is no dispute between the parties that the Due Process Clause requires a state to provide an opportunity to a regulatee to mount a defense to regulatory requirements "at a meaningful time and in a meaningful manner," *Fuentes v. Shevin*, 407 U.S. 67, at 80 (1972). Rather, the parties dispute whether Ohio Edison had available to it a pre-enforcement remedy that it chose not to employ, and, if not, whether its conceded opportunity to challenge regulations as a defense to an enforcement action (unless waived or barred by *res judicata* or other such doctrine) constitutes a meaningful opportunity to be heard.



Assuming, *arguendo*, that Ohio Edison may only challenge applicable emission standards as a defense to an enforcement action, Ohio Edison has not demonstrated that such offends the Due Process Clause. Ohio Edison relies exclusively on *Ex parte Young*, 209 U.S. 123 (1908). There, the Court, in an extremely narrow holding, ruled that the Due Process Clause prevents a state from establishing mandatory rates for a railroad, and, in the absence of a pre-enforcement remedy, providing such harsh penalties for violating such rate requirements that the railroad will not risk non-compliance so as to challenge the rates in the resultant enforcement action. The Court concluded that such a scheme wholly deprived the regulatee of a meaningful opportunity to challenge the rates.

*Young* does not govern here for two reasons. First, as discussed more fully below, Ohio Edison had available to it a pre-enforcement remedy it chose not to employ. Second, *Young* rests upon the fact that the penalties for non-compliance were so extreme that the railway chose to comply rather than risk enforcement. In the present case, as is clear from the Petition for Writ of Certiorari, Ohio Edison has chosen not to comply, but rather to persist in an ill-chosen course of administrative litigation. Clearly, therefore, the risks of being subjected to penalties in enforcement did not coerce Ohio Edison into compliance, as had occurred in *Young*. Therefore, a requisite of the holding and discussion in *Young* is lacking, rendering the case distinguishable from the case at bar.

Moreover, the Court indicated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), that the constitution does not require provision of a pre-enforcement remedy against administrative regulations. The Court concluded, on the basis of statutory provisions, that a pre-enforcement remedy existed against the regulations there at issue. The Court noted, however, that had the intent of Congress been to the contrary, the Court would be bound thereby, thus necessarily concluding that Congress is under no constitutional mandate to provide the pre-enforcement remedy. Such is apparent from the passage set forth at page 153:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, ac-

> cess to the courts under the Administrative Procedure Act and Declaratory Judgment Act must be permitted, *absent a statutory bar* or some other unusual circumstance, neither of which appears here. (Emphasis added).

Because Congress may impose "a statutory bar" to availability of a pre-enforcement remedy, such a remedy cannot be required by the Due Process Clause.

Therefore, Ohio Edison's invitation to the Court to expand the Due Process Clause well beyond its recognized scope should be declined.

**3. Ohio Edison Had Available To It A Pre-enforcement Remedy It Chose Not To Employ.**

The holding in *Young* is premised on the conclusion that the railway did not have available to it a pre-enforcement remedy against the prescribed rates, and that the enforcement defense remedy was effectively foreclosed. By contrast, Ohio Edison had a pre-enforcement remedy.

The emission standards of which Ohio Edison complains were effectuated by the now defunct Air Pollution Control Board in February of 1972. No exclusive statutory scheme had been established for review of such regulations, and Ohio Edison therefore had available to it an action in declaratory judgment to challenge the lawfulness of the emission standards, *Burger Brewing Co. v. Liquor Control Commission*, 34 Ohio St.2d 93 (1973). It was not until October of 1972 that the General Assembly extinguished the availability of declaratory judgment by creation of the Environmental Protection Agency subject to exclusive review in the Environmental Board of Review, *State ex rel. Williams v. Bozarth*, 55 Ohio St.2d 34 (1978). Therefore, for over eight months, Ohio Edison sat on a pre-enforcement remedy against emission standards. Ohio Edison, however, made the deliberate choice to attempt to convert the licensing proceeding for a variance into a forum for its broad-based challenge to the emission standards. As the court ruled below, the variance proceeding may not be converted into such an *ad hoc* rulemaking proceeding. Therefore, Ohio Edison simply erred in picking the wrong remedy, and should not now rely on the Due Process Clause to rectify its error.



The availability of the pre-enforcement remedy renders *Young* inapposite. In both *Wadley Southern Railway Company v. Georgia*, 235 U.S. 641 (1915), and *St. Louis, Iron Mountain and Southern Railway Company v. Williams*, 251 U.S. 63 (1919), the Court refused to apply the doctrine of *Young* on the ground that the railways had had an opportunity to challenge the rates in a forum other than in defense to enforcement. The Court's final paragraph in *Wadley* is pertinent here, 235 U.S. at 699:

> But where, as here, after reasonable notice of the making of the order, *the carrier failed to resort to the safe adequate, and available remedy by which it could contest in the courts its validity*, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful. (Emphasis added).

Ohio Edison, having chosen to forego declaratory judgment, should be left to its defenses in enforcement, and should not be permitted, on spurious due process grounds, to stretch its licensing proceeding well beyond its appropriate scope.

**4. Even If Correct, Ohio Edison's Due Process Analysis Is Not Necessarily Applicable To The Administrative Proceeding Here At Issue.**

Ohio Edison's contention that the Due Process Clause requires provision of a pre-enforcement remedy, even if correct, does not compel the conclusion that the licensing proceeding below must constitute that remedy. Surely, it is the state which must determine how to provide such a remedy, either by declaratory judgment, administrative proceeding, or otherwise. But Ohio Edison argues that it is *this* licensing proceeding which *must* be regarded as the due process hearing in which to challenge emission standards. Surely, the Due Process Clause is not so specific as to require the state to endorse a regulatee's choice of the forum such regulatee chooses to employ in mounting its challenge to regulatory requirements.

Therefore, because Ohio's purported duty to provide to Ohio Edison a pre-enforcement remedy may exist independently from the administrative proceeding below, review and remand are inappropriate.

**5. The Alleged Error Did Not Alter The Result, And Is Therefore Not Prejudicial.**

Lastly, even if the Director erred in not permitting the challenge to emission standards, such error was not prejudicial, and therefore should not be the subject of appellate review. The proceeding arose upon applications for variances, which are governed by OAC 3745-35-03. Subsection (F) (2) of that regulation flatly forbids issuance of variances after specified and now expired deadline dates. The deadline dates have been upheld as authorized by and consistent with Ohio law, *Cleveland Electric Illuminating Co. v. Williams*, 55 Ohio App.2d 272 (Franklin County, 1977). Therefore, Ohio Edison's challenge to emission standards, even if successful, would not have served as a basis upon which variances could issue.

In this sense, therefore, Ohio Edison seeks a forum in which the Director is to issue an advisory opinion regarding his emission standards. Such, surely, is not mandated by any accepted notion of due process.

## CONCLUSION

Ohio Edison has not demonstrated that the denial of variances in accordance with a lawful state regulation has offended the Due Process Clause. Accordingly, Ohio Edison has not presented a case to this Court in which "a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court," U.S. Sup. Ct. Rule 19(1) (a). Therefore, a writ of certiorari should not issue.

Respectfully submitted,

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